Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 2000

JENNY MANYBEADS, et al.
Petitioners,

v.

UNITED STATES OF AMERICAL, et al.
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1 DOES THE SOVEREIGN IMMUNITY OF AN INDIAN TRIBE THAT CHOOSES TO ABSENT ITSELF FROM A LAWSUIT BAR A CLAIM BY INDIDVIDUAL INDIANS AGAINST THE FEDERAL GOVERNMENT WHICH CHALLENGES THE CONSTITUTIONALITY OF A FEDERAL STATUTE AND WHICH SEEKS ONLY PROSPECTIVE INJUNCTIVE AND DECLARATORY RELIEF FROM THE FEDERAL GOVERNMENT AND NOTHING FROM THE ABSENT TRIBE?

2. CAN THE UNITED STATES ADEQUATELY REPRESENT THE INTEREST OF AN INDIAN TRIBE WHICH VOLUNTARILY ABSENTS ITSELF FROM A LAWSUIT WHERE CONGRESS HAS DIRECTED THE GOVERNMENT TO REPRESENT POTENTIALLY CONFLICTING INTERESTS OF THE ABSENT TRIBE AND OTHER PARTIES, WHERE THE UNITED STATES ASSERTS THAT IT CAN REPRESENT BOTH INTERESTS, WHERE THE ABSENT TRIBE CAN OFFER NO EXAMPLE OF ANY ACTUAL CONFLCIT WITHIN THE CONTEXT OF THE LITIGATION AND WHICH OTHERWISE DENIES THE OTHER PARTY ANY ALTERNATIVE FORUM TO CHALLENGE THE CONSTITUTIONALITY OF A FEDERAL STATUTE?

3. DOES AN INDIAN TRIBE THAT FULLY PARTICIPATES IN LITIGATION AND MEDIATION OF A LAWSUIT INCLUDING THE PREPARATION AND PROPOSAL OF SETTLEMENT AGREEMENTS WHICH ARE ACCEPTED BY THE OTHER PARTIES AND WHICH UNJUSTLY ENRICH THE TRIBE, WAIVE ITS SOVEREIGN IMMUNITY OR IN THE ALTERNATIVE SHOULD IT BE ESTOPPED FROM CLAIMING IMMUNITY?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed below.

JENNY MANYBEADS, YELLOWWOMAN YAZZIE, ASHKIE BITSI, IRENE YAZZIE, BLANCHE WILSON, WALDINE YAZZIE, DAN R. YAZZIE, BESSIE BEGAY, MAE WILSON TSO, ASKIE TSO, EARL TSO, SAM W. TSO, BETTY A. TSO, FIONA TSO, JOE BENALLY ,RUTH BENALLY, ALICE BENALLY, LOUISE BENALLY, VIOLET ASHKIE, KEE SHAY, MAE SHAY, ELSIE SHAY, ZONNIE KATANEY, JOHN KATANEY, JANE BIAKEDDY, SLIM BIAKEDDY, KATHERINE SMITH, MARY ROSE BEDONIE, ROBERTA BLACKGOAT, PAULINE WHITESINGER, SARAH BEGAY, BESSIE NEZ, WILSON NEZ, JR., LIVINGSTON NEZ, LILLIAN SONNIE, NELLICH WALTERS, HARRY NEZ, BESSIE HATATHLIE, JACK HATATHLIIE, ELLA BEDONIE, LENORE HILL, GENEVIEVE HATATHLIE, WILLY BEGAY, MARK CHARLEY, IDA MAE CLINTON, HARRIET WILSON, KEE WATCHMAN, DINE' DAYIKAH ADA YALT'I (DDAY) (Voice of the Navajo Families), FRANCES BAHE, MARGARET BAHE, ALICE TSOSIE, LOUISE BEGAY, MARY T. BEGAY, ALFRED McCABE, ANNA BEGAY, CLARENCE BLACKROCK, ZONNIE BAHE, JOHN YAZZIE, MAE YAZZIE, MARY BLACKROCK, EVA LEE, LETA O'DANIEL, ELISE BENALLY, LUCILLE B. BENALLY, RAMON CALVIN BAHE, *Petitioners,*

UNITED STATES OF AMERICA, DONALD P. HODEL, in his official capacity as Secretary of the Department of Interior, UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES BUREAU OF INDIAN AFFAIRS, ROSS O. SWIMMER, in his official capacity as Assistant Secretary of the Department of Interior, HAWLEY ATKINSON, in his official capacity as Chairman of the Navajo Hopi Relocation Commission, THE NAVAJO HOPI INDIAN RELOCATION COMMISSION, an independent federal agency, *Respondents*

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The above named Petitioners respectfully pray that a *writ of certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceeding on April 18, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 209 F.3d 1164 (9th Cir. 2000), and is contained in the Appendix attached hereto, p. 1a, *infra*.

The memorandum decision of the United States District Court for the District of Arizona (Carroll, D.J.) is reported at 730 F. Supp. 1515 (1989). A copy of that decision is contained in the Appendix attached hereto, p. 5a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 USC § 1331 and 1346, Petitioners brought this suit in the Federal District Court for the District of Columbia on January 26, 1988. The Defendants filed a motion to transfer the case to the Federal District Court for the District of Arizona which was granted on February 29, 1988. On September 20, 1989, the District Court granted the Federal Defendants Rule 12 (b) (6) Federal Rules of Civil Procedure motion to dismiss and denied Plaintiffs' motion for a preliminary and permanent injunction. See 5a, *infra*.

On Petitioners' appeal, the Ninth Circuit on April 18, 2000, entered a judgment and opinion affirming the District Court's order dismissing Petitioners' complaint. See p. 1a, *infra*. A petition for rehearing was denied on July 31, 2000. A copy of the July 31, 2000 order is contained in the Appendix attached hereto, p. 16a, *infra*.

On October 20, 2000, Justice O'Connor ordered that the time for filing this Petition for *Writ of Certiorari* be extended to and including November 28, 2000.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 USC § 1254 (1).

STATUTE INVOLVED

The decision below involved an interpretation of Rule 19 Federal Rules of Civil Procedure and not of any statute.

STATEMENT OF THE CASE

Petitioners are Navajo Indians who in 1988 filed suit against the United States and several federal agencies and officials challenging the constitutionality, and seeking to enjoin enforcement, of the forced relocation provisions of the Navajo-Hopi Indian Lands Settlement Act of 1974 Pub. L. No. 93-531, 88 Stat. 1712 (1974) (codified as amended in 25 USC § 640d (1982)) ("Relocation Act"). Petitioners allege that the Relocation Act, violates their constitutional right to the free exercise of their religion by requiring them to relocate from the sacred land which connects them to their spiritual world and their Creator, contrary to their religious teachings and beliefs. Further that the Relocation Act, by separating them from their sacred homelands, prevents the further free exercise of Petitioners' religion. Petitioners also allege that they have been denied equal protection under the law because the federal government has historically permitted "similarly situated" non-Indians who have occupied Indian land, to settle similar land claims with the payment of money rather than by their forced relocation.

The land dispute at issue in this case between Petitioners, the federal government, the Navajo Nation and the Hopi Tribe is well over 100 years old and has spawned four (4) federal statutes[1], dozens of federal lawsuits[2], a new federal agency[3] and has resulted in the largest forced

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[1] Pub. L. No. 85-547, 72 Stat. 402 (1958); Pub. L. No. 93-531, 88 Stat. 712 (1974); Pub. L. No. 96-305, 94 Stat. 929 (1980); Pub. L. No. 104-301, 110 Stat., 3649 (1996).

[2] See, e.g., Masayesva ex rel. *Hopi Indian Tribe v. Hale*, 118 F.3d 1371 (9th Cir. 1997); *Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457 (9th Cir. 1996); *Masayesva v. Zah*, 65F.3d 1445 (9th Cir. 1995); *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908 (9th Cir. 1995); *Attakai v. United States*, 21 F.3d 1111 (9th Cir. 1994). The related lawsuits in which the Hopi Tribe is a party include *Hopi Tribe v. United States*, Civ. Nos. 319-84L, 320-84L, 321-84L and 651-89L pending in the United States Court of Federal Claims; *Hopi Tribe v. Navajo Tribe et al.*, Civ. 85-801 PHX-EHC, pending in the United States District Court for the District of Arizona; *Hopi Tribe v. Wat*, 530 F. Supp. 1217 (D.Ariz. 1982), aff'd, 719 F.2d 314 (9th Cir. 1983); *Sidney v. MacDonald*, 536 F.Supp. 420 (D.Ariz. 1982), aff'd *Sidney v. Zah*, 718 F.2d 1453 (9th Cir. 1983); *Sekaquaptewa v. MacDonald*, 626 F.2d 113 (9th Cir. 1980); *Sekaquaptewa v. MacDonald*, 616 F.2d 801 (9th Cir. 1980); *Sekaquaptewa v. MacDonald*, 591 F.2d 1289 (9th Cir. 1979); *Sekaquaptewa v. MacDonald*, 575 F.2d 239 (9th Cir. 1978); *Sekaquaptewa v. MacDonald*, 544 F.2d 396 (9th Cir. 1976); *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974); *United States v. Kabinto*, 456 F.2d 1087 (9th Cir. 1972); *Hamilton v. Nakai*, 453 F.2d 152 (9th Cir. 1971).

[3] The federal Navajo and Hopi Indian Relocation Commission (NHIRC) was created by Pub. L. No. 93-531, § 12 (1974), 88 Stat. 1716, amended by Pub. L. No. 96-305, § 5

relocation of any racial group in this country this century with the exception of the relocation and internment of 120,000 persons of Japanese ancestry during World War II.[4]

Petitioners' claims arise from a dispute over the right to occupy and use land located in northern Arizona which has been occupied and used by Petitioners and their ancestors for generations. Petitioners' ancestors were previously forcibly relocated from their homelands by the federal government following the invasion of the Navajo territory by Kit Carson and the United States Army in 1863.[5] More than 8,500 Navajos were forced to march to Fort Sumner, New Mexico on what became known as the infamous "Long Walk."[6] In 1868 this catastrophic relocation policy was aborted and the Navajos who had survived were marched back to their homelands.[7] A peace treaty was also signed establishing the original Navajo reservation located to the east of the land at issue in this case.[8] As white settlers moved westward the Navajos and the other southwestern tribes continued to be pushed westward and closer together.[9]

In 1882 President Chester Arthur signed an Executive Order which created a new reservation west of the 1868 Navajo reservation for the settlement of Indians by the Secretary of Interior.[10] The 1882 Executive Order area, which contains the lands at issue in Petitioners'

(1980), 94 Stat. 932 (codified in 25 USC § 640d-11). (Later renamed Office of Navajo and Hopi Indian Relocation).

[4] On February 19, 1942, President Roosevelt signed Executive Order No. 9066, 3CFR § 1092 (1942), which authorized the Secretary of War to establish military areas and regulate travel within them. The Military Doctorate of Compulsory Relocation Program requiring persons of Japanese ancestry to report to and to remain at designated relocation centers and internment camps.

[5] L. KELLY, THE NAVAJO INDIANS AND FEDERAL INDIAN POLICY 5 (1968).

[6] *Id.* At 6. See also R. LOCKE, THE BOOK OF THE NAVAJO at 323-87 (1979)

[7] The relocation effort was a catastrophe for the Navajo: 2,000 died there – one quarter of the number interned – in 4 years." UNITED STATES COMM. ON CIVIL RIGHTS, THE NAVAJO NATION: AN AMERICAN COLONY 15 (Sept. 1975). See also D. BROWN, BURY MY HEART AT WOUNDED KNEE (1970).

[8] Treaty of 1868, United States – Navajo Tribe, 15 Stat. 667.

[9] See generally J. CORRELL & A. DEHIYA, ANATOMY OF THE NAVAJO INDIAN RESERVATION: HOW IT GREW. See also R. LOCKE, *supra,* note 6, and D. BROWN, *supra,* note 7.

lawsuit, consists of approximately 1.8 million acres of land which has, for generations, been inhabited by Petitioners' families, other Navajos and members of the Hopi Tribe.

With the discovery of coal, uranium and other natural resources, conflicts over the 1882 reservation increased. In 1958, Congress passed Pub. L. No. 85-547, 72 Stat. 403 (1958) which waived the Tribes' immunity from suit and authorized the Navajo and Hopi Tribes to participate in a lawsuit that would determine the rights and interests in the 1882 Executive Order area.[11] The 1958 Act also "vested" title to the land in both Tribes.[12] The Hopi Tribe filed suit claiming that the Navajos were occupying Hopi Land.[13] The Navajo Tribe filed a counterclaim for exclusive rights to those areas that Navajo families inhabited.[14]

In 1962 *Healing v. Jones* (II), 210 F.Supp. 125 (D. Ariz. 1962), cert. denied, 373 U.S. 758 (1963) (per curiam), was decided. The *Healing* Court ruled that except for one-sixth of the land which had been customarily used exclusively by the Hopis, the Hopi and Navajo Indian Tribes have "joint, undivided, and equal interests as to the surface and sub-surface including all resources appertaining thereto, subject to the trust title of the United States."[15] The area of exclusive Hopi use became the Hopi Reservation known as "District 6".[16] The remaining disputed land became known as the Joint Use Area (JUA). The *Healing* Court left

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[10] Executive Order of President Chester Arthur, December 16, 1882, reprinted in *Healing v. Jones (II)*, 210 F.Supp. 125, 129 n. 1 (D. Ariz. 1962), *Aff'd*, 373 U.S. 758 (1963) (per curiam).

[11] The act authorized the tribal governments to commence or to defend an action on behalf of their tribes, "including all villages and clans thereof, and on behalf of any Navajo or Hopi Indians claiming an interest in the area" of the 1882 Executive Order Reservation. Pub. L. No. 85-547 at § 1. A three judge federal court was given jurisdiction to "determine[d] their rights and interest ... in and to said lands and quiet title thereto." *Id.*

[12] Section I of the 1958 Act provides the lands described in the Executive Order of December 16, 1882 are "held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of Interior pursuant to such Executive Order."

[13] *Healing v. Jones (II)*, 210 F.Supp. 125 (D. Ariz. 1962), *Aff'd.*, 373 U.S. 758 (1963) (per curian).

[14] *Id.*

[15] 210 F.Supp. at 192.

[16] See *Healing v. Jones(II)*, 210 F.Supp. at 158-59.

unresolved the issue of how the undivided interest might be fairly administered or divided.[17]

In 1972, the Hopi Tribe sued to restrict Navajo land use in the JUA.[18] On October 14, 1972 the Federal District Court issued a Writ of Assistance and Order of Compliance, directing the Navajo tribal chairman and the Department of Interior to reduce Navajo livestock in the joint use area by 85%. The order also prohibited any "new construction" by members of the Navajo Tribe on the JUA without a permit issued by both tribes.

Joint use of the 1882 reservation continued until 1974 when Congress passed Pub. L. No. 93-531.[19] Its most significant provision gave the United States District Court for Arizona jurisdiction to partition the JUA and directed a 50/50 division.[20] An independent federal agency, The Navajo-Hopi Indian Relocation Commission (NHIRC), was established to relocate those Indians, who following partition of the land, were left living on the "wrong side of the line."[21]

In 1977 the District Court approved the partitioned line which divided the JUA into Hopi Partitioned Land (HPL) and Navajo Partitioned Land (NPL).[22] The JUA has always been occupied, almost exclusively, by members of the Navajo Tribe but also used by Hopis who lived in nearby District 6. As a result, while nearly 15,000 Navajo individuals were subject to the relocation requirement only approximately 100 Hopis were required to relocate. All members of both tribes were supposed to be relocated by July 1986. Due to the strong opposition to forced relocation, thousands of Navajos, including Petitioners, had not relocated by the 1986 deadline.

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[17] 210 F.Supp. at 191, 192.

[18] *Hamilton v. Nakai*, 453 F.2d 152 (9th Cir. 1971), cert. denied., 406 U.S. 945.

[19] 88 Stat. 1714 (1974), amended by Pub. L. No. 96-305, 94 Stat. 930 (1980), codified in 25 USC § 640d-640d-28 (1983).

[20] 25 USC § 640d-5 (1983). Congress mandated five criteria for partition of the JUA lands. In so far as practicable, the boundary line had to: 1) include the higher density population areas in each tribe; 2) result in lands equal in acreage and quality; 3) result in partitioned lands contiguous to each tribes reservation; and 4) facilitate fencing. In addition, Congress directed that the exclusive Hopi Reservation (District 6) not be reduced or limited. *Id.*

[21] 25 USC § 640d-11.

[22] The February 10, 1997 partition order was unpublished. See *Sekaquaptewa v. MacDonald*, 575 F.2d 239, 241 (9th Cir. 1998).

In 1980, Congress amended the 1974 Act.[23] The 1980 amendments authorized payment of attorneys fees for both Tribes in the continuing litigation, increased authorizations for the operating expenses of the relocation commission, gave each tribe jurisdiction over the lands partitioned to it, and directed the Secretary of Interior to "take such action as may be necessary in order to assure the protection … of the rights and property of individuals subject to relocation."[24]

In 1988 Petitioners filed their lawsuit on behalf of themselves and all similarly situated Navajo individuals who faced involuntary relocation. Prior to ruling on Petitioners' motion for class certification, the District Court granted the federal defendants Rule 12 (b) (6) motion to dismiss.[25] The District Court's decision to dismiss Petitioners lawsuit was based upon its misinterpretation of this Court's decision in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).[26]

Petitioners appealed the dismissal and oral argument on Petitioners' appeal was heard on April 10, 1991 by the Ninth Circuit. On May 10, 1991, the Ninth Circuit issued its decision stating that it would be in the best interest of the parties to settle the lawsuit. The Court therefore directed Petitioners and the federal government to initiate settlement discussions under the direction of a court appointed mediator.[27] The court also authorized the Navajo Nation and Hopi Tribe, which had participated in the litigation as amicus curie, to participate as parties in the settlement proceedings.[28] The court's May 1991 order also deferred submission of the appeal.[29]

The four parties then engaged in mediation and settlement negotiations from 1991 to 1998. The Hopi Tribe was represented by

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[23] Pub. L. No. 96-305, 94 Stat. 932; 25 USC § 640d-28 (1983)

[24] 25 USC § 640d-25, 27 (a); 640d-24 (a) (5); 25 USC § 640d-9 (e); 25 USC § 640d-9 (c).

[25] 730 F.Supp. 1515 (1989).

[26] *Lyng*, which involved the discretionary decision making of the U.S. Forest Service to build a road through unoccupied forest service land, did not, as in this case, involve a federal statute which required individuals to act contrary to their religious beliefs and teachings by involuntarily relocating them from their sacred homelands and therefore prohibiting further exercise of their religion.

[27] May 10, 1991 order of the Court of Appeals (contained in Appendix attached hereto, p. ____, *infra*).

[28] *Id.*

[29] *Id.*

counsel and participated at all stages of the mediation. During the mediation, the Hopi Tribe drafted a settlement proposal which was given to the Navajos. The initial proposal was overwhelmingly rejected. Following further mediation the Hopi Tribe drafted and proposed the "Accommodation Agreement."[30] The Accommodation Agreement offered eligible Navajos an opportunity to remain on the HPL for a period of seventy-five (75) years. Under the terms of the Accommodation Agreement, eligible Navajo families are entitled to lease for seventy-five (75) years a three (3) acre homesite, ten (10) acres of farmland and may engage in other traditional uses of the HPL, the Accommodation Agreement also increased grazing available on the HPL to eligible Navajos and lifts the court ordered construction freeze for those families who signed the Agreement.[31]

In addition, through the *Manybeads* mediation, the Hopi Tribe and the United States, on December 14, 1995, entered into a "Settlement Agreement" in which the Hopi Tribe promised to offer the Accommodation Agreement to the Navajo families and abide by its terms. The Hopi Tribe also agreed to dismiss three existing lawsuits against the United States. In exchange the United States agreed to pay up to 50.2 million dollars to the Hopi Tribe and, under specified circumstances, to take into trust for the Hopi Tribe up to 500,000 acres of land that the Tribe might acquire.[32] The Settlement Agreement contained a clear waiver of immunity by the Hopi Tribe which provides:

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[30] Accommodation Agreement (contained in 2nd supplemental excerpts of record accompanying the supplemental brief for the federal appellees at tab 3)

[31] Petitioners and other Navajos residing on HPL continue to express their opposition to the Accommodation Agreement because of its burden on their free exercise of religion. Specifically, Navajo residents of HPL object to the lack of a permanent right to remain on their sacred land, the Hopi Tribe's prohibition on Navajo burials on HPL, limitations and restrictions on Navajo grazing, the Hopi Tribe's failure to negotiate a dispute resolution process as required by the Agreement, the Hopi Tribe's failure to provide the guaranteed number of homesites and grazing allocation to the Navajo residents and the lack of third party review or mechanisms for enforcing the Agreement.

[32] The Settlement Agreement and the 1996 Act provide that funds be paid out in the following manner: (1) the Hopi Tribe will receive $2.4 million once the Tribe files a motion to dismiss its appeal in the Ninth Circuit in *Secakuku v. Hale*; (2) the Hopi Tribe will receive $22.7 million once legislation extending the Tribe's leasing authority to 75 years has been enacted and once the Tribe's claims in the Court of Federal Claims for damages due to any Federal action which occurred before 1982 are dismissed; (3) the Hopi Tribe will receive $10 million once 65% of the Navajo families residing on the Hopi

> The United States and the Tribe hereby agree that the provisions of this Settlement Agreement shall be enforceable in either the United States Court of Federal Claims in Washington, D.C., or in the United States District Court in Phoenix, Arizona, as appropriate.

The Hopis' two settlement proposals were then presented to Congress for approval. On October 11, 1996 the Navajo-Hopi Land Dispute Settlement Act of 1996 was enacted. Pub. Law. No. 104-301 (1996). In the 1996 Act Congress found that it is in the public interest for the Petitioners and other Navajo residents of the HPL, the Hopi Tribe and the United States to reach a peaceful resolution of the long standing land dispute. The 1996 Act, approved, ratified and confirmed the Hopi Tribe's Accommodation Agreement and Settlement Agreement negotiated in the *Manybeads* mediation.[33]

In 1996, the *Manybeads* Plaintiffs and the federal defendants filed a joint motion for a remand to a District Court for the limited purpose of class certification and approval of the Accommodation Agreement as a settlement of the *Manybeads* lawsuit. On remand, the District Court conducted a four (4) day "fairness" hearing. On February 21, 1997, following days of emotional testimony for and against the proposed settlement and prior to a ruling on the fairness of the proposed settlement, the Hopi Tribe advised the Court and the parties that Petitioners could accept the Hopis' Accommodation Agreement without agreeing to dismiss their appeal. In other words, Petitioners could accept the Accommodation

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reservation have signed an Accommodation Agreement or have chosen to relocate and once the Hopi Tribe's claims in the Court of Federal Claims for livestock trespass damages against the United States from 1983 through 1988 are dismissed; (4) the Hopi Tribe will receive $15.1 million once 75% of the Navajo families residing on the Hopi reservation have signed an Accommodation Agreement or have chosen to relocate and once the Hopi Tribe's claims in the Court of Federal Claims for livestock trespass damages against the United States from 1989 through and including 1996 are dismissed; and (5) once 85% of the Navajo families residing on the Hopi reservation have signed an Accommodation Agreement or have chosen to relocate, the Secretary shall take into trust for the Hopi Tribe up to 500,000 acres of rural lands in northern Arizona, consistent with the terms of the Settlement Agreement and the 1996 Settlement Act. See S. Rep. 104-363, 104th Cong. 2d Sess. at 35-47 (1996); See also Supplemental Brief of Federal Appellees at p. 3-6.

[33] See Supplemental Report From the Committee on Indian Affairs, providing for the settlement of the Navajo-Hopi Land dispute, and other purposes, S. Rep. 104-363, 104th Cong. 2d Sess at (September 9, 1996) contained in 2nd supplement excerpts of record accompanying the supplemental brief for federal appellees at tab 4, 5 and 14.

Agreement and still pursue their constitutional challenge of the Relocation Act in federal court. The Hopi Tribe's proposal provided the parties with a "win-win" opportunity. Relying on the Hopi Tribe's stated position, the parties filed a "Joint Motion to Withdraw Motion for Certification of a Class and Stipulation of Settlement". In the joint motion the parties stated:

> At the fairness hearing in Mid-February, it became evident that many families had an interest in hearing from the Court of Appeals on their legal claims in this lawsuit. As the parties talked further with the families in February and March of this year, they determined that the best chance of solving the long term problem lay in affording the families the opportunity to both sign an agreement and to pursue their appeal, thus affording them a "win-win" choice. Prior to the fairness hearing, only five of the eligible homesites had agreed to sign an agreement that once the "win-win" option was presented to them, another 77 homesites signed agreements with the understanding they could pursue the *Manybeads* appeal.[34]

Once the Hopi Tribe's "win-win" offer was presented to them, an additional seventy-seven (77) of the ninety-six (96) eligible occupied homesites signed Agreements with the understanding that the Ninth Circuit would decide Petitioners' constitutional challenge to the Relocation Act. The District Court also granted the parties' Motion for Withdrawal of the Motion to Certify the Class and Approve the Stipulation of Settlement that would have required the dismissal of Petitioners' lawsuit.

The *Manybeads* lawsuit was then returned to the Ninth Circuit for a decision on Petitioners' constitutional claims. The parties filed supplemental briefs on the First and Fourteenth Amendment claims. The supplemental briefs also addressed the effect Congress' enactment of the Religious Freedom Restoration Act of 1992 ("RFRA") and this Court's decision in *Boerne v. Flores*, 117 S. Ct. 2157 (1997) have on Petitioners' free exercise claim. Following the parties supplemental briefing but prior

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[34] Joint motion to withdraw motion for certification of a class and stipulation of settlement, CR497 at p.2 (copy included in 2nd supplemental excerpts of the record accompanying the supplemental brief for the federal appellees at tab 9).

to the supplemental oral argument, the Ninth Circuit, *sua sponte*, directed the parties to also brief the issue of whether the Hopi Tribe is a necessary party to the lawsuit who can not be joined because of its sovereign immunity. This issue had not been considered or decided by the District Court.

Petitioners filed their supplemental brief arguing that the Hopi Tribe is not a necessary party to a lawsuit seeking injunctive and declaration relief from a federal statute. Further, that if the Hopi Tribe was a necessary party, it is adequately represented by the United States government. The federal defendants filed a supplemental brief agreeing with Petitioners that the United States was an adequate representative for the Hopi Tribe if the Hopi Tribe was a necessary party to the litigation. The Hopi Tribe filed its supplemental brief arguing that it was a necessary and indispensable party which can not be joined because of its sovereign immunity, that the U.S. can not adequately represent it and that the *Manybeads* lawsuit must therefore be dismissed.

On April 18, 2000, the Ninth Circuit affirmed the dismissal of Petitioners lawsuit finding the Hopi Tribe to be a necessary and indispensable party who could not be joined because of its sovereign immunity. Further, that the United States could not adequately represent the interests of the Hopi Tribe because of an alleged conflict between the United States' trust duty owed to the Hopi Tribe and to the Petitioners. The Ninth Circuit based its decision on the argument of counsel for the Hopi Tribe and without the benefit of any evidence or factual findings by the District Court on the issue of the Hopi Tribe's claim of indispensability, the United States position that it could adequately represent the interests of the Hopi Tribe or whether any actual conflict existed which would prevent the United States from adequately representing the interests of the Hopi Tribe.

On July 31, 2000, the Ninth Circuit denied Petitioners' motion for rehearing. Petitioners now seek review of the Ninth Circuit's decision in the only remaining forum available for review of their constitutional challenges to their involuntary relocation from their sacred ancestral homelands by the federal government.

REASONS FOR GRANTING THE WRIT

I. The United States Court of Appeals for the Ninth Circuit Has Decided an Important Federal Question in a Way That Conflicts with Decisions of the Fifth Circuit Court of Appeals, the Tenth Circuit Court of Appeals and Several District Courts in the Eight Circuit

The decision below fails to directly address an important federal question- whether an Indian Tribe's sovereign immunity necessarily extends to actions which only seek prospective equitable relief. The appeals court dismissed Petitioners' claims, founded on alleged violations by the Respondent United States of rights guaranteed by the United States Constitution, for failure to join *amicus* Hopi Tribe. The court determined that the Tribe was a necessary party which could not be joined by reason of its sovereign immunity and dismissed Petitioners' suit under Rule 19(b) of the Federal Rules of Civil Procedure. The court failed to address the issue of the Tribe's sovereign immunity as it relates to the nature of Petitioners' claims and the relief requested. In so doing the Ninth Circuit decided on a definition of the parameters of tribal sovereign immunity in a way that conflicts with decisions of the Fifth Circuit Court of Appeals, the Tenth Circuit Court of Appeals, and several district courts in the Eighth Circuit.

In the instant case Petitioners are asking for prospective equitable relief only. They seek a declaration that the relocation requirements of the Relocation Act would deprive them of their right to the free exercise of religion under the First Amendment and their right to the equal protection of the laws under the Fourteenth Amendment, and seek an injunction to prevent the Respondent United States from taking actions to involuntarily remove them from their sacred homeland. Petitioners complain of no action by *amicus* Hopi Tribe, nor do they seek relief from the Tribe.

On October 30, 2000, this Court accepted *certiorari* in the case of *C&L Enterprises, Inc., v. Citizen Potawatomi Nation*, 00-292. The issue presented was whether the execution of an arbitration agreement by an Indian tribe constitutes a waiver of sovereign immunity to a state court suit against the tribe to enforce an arbitration award. As set forth in the Petition for Writ of *certiorari* a decision on that question by the Oklahoma Appellate Court conflicts with decisions of two federal circuits and two

state courts of last resort. The question presented in *C&L Enterprises* is closely related to the question here. The issue encompassing both questions is the extent to which sovereign immunity shields a tribe from suit. Like the conflicting decisions regarding waiver of sovereign immunity in the arbitration agreement context, contradictory decisions on the relation of sovereign immunity to the nature of relief requested has resulted in confusion as to when the assertion of sovereign immunity requires dismissal of a lawsuit. The ambiguity and inconsistency among courts as to the extent of tribal sovereign immunity requires clarification and direction from this Court.

The question of whether an Indian tribe's sovereign immunity bars actions against the tribe for prospective equitable relief was addressed by the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of appeals in conflicting decisions handed down in July, 1999. In *TTEA v. Ysleta del sur Pueblo*, 181 F.3d 676 (5th Cir. 1999), the Fifth Circuit ruled that tribal sovereign immunity is not a bar to an action for declaratory or injunctive relief. The defendants in the case were tribal officials of Ysleta del Sur Pueblo and the tribe itself.[35] The appeals court examined this Court's decision in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700 (1998), noting that it "was an action for damages, not a suit for declaratory or injunctive relief. This difference matters." *Ysleta*, 181 F.3d at 680. As to the type of relief sought and its relation to sovereign immunity the Fifth Circuit concluded:

> The distinction between a suit for damages and one for declaratory or injunctive relief is eminently sensible, and nothing in *Kiowa* undermines the relevant logic. State sovereign immunity does not preclude declaratory or injunctive relief against state officials. *See Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state sovereign immunity.

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[35] Ysleta was an action by a corporation seeking federal court intervention in a suit against the corporation in tribal court. Although ruling that the tribe's sovereign immunity was not a bar to the action because the corporation was requesting injunctive relief only, the Fifth Circuit ruled that the corporation had failed to exhaust tribal remedies and that jurisdiction was proper in the tribal court in this instance.

> *Cf. Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

Id.

The appeals court found that this Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct.1670(1978), finding "a tribal governor not immune from a suit seeking declaratory and injunctive relief against enforcement of a tribal ordinance.." controls. *Id.* However, the *Ysleta* court went further, finding that none of the defendants, tribal officials, and the tribe itself, were shielded from suit.[36]

The day following the opinion in *Ysleta* the Eleventh Circuit issued its opinion in *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999). The State of Florida alleged that the tribe was conducting certain gaming operations in violation of the Indian Gaming Regulatory Act (IGRA).[37]The Eleventh Circuit rejected the conclusion reached by other courts, see *infra*, that a tribe waives its sovereign immunity to claims for injunctive and declaratory relief by electing to engage in gaming subject to regulation under IGRA the appeals court also rejected the State of Florida's additional argument that the bar of sovereign immunity should not extend to an action for injunctive relief, taking the position that all waivers of sovereign immunity must be explicitly stated:

> [W]e decline to modify the doctrine of tribal sovereign immunity absent an express command to the contrary from either Congress or a majority of the Supreme Court. Accordingly, we reject the State's argument that the Tribe's immunity does not necessarily extend to this action for prospective equitable relief.

181 F.3d at 1245.

The Tenth Circuit addressed the issue of tribal sovereign immunity and claims for equitable relief in *Mescalero Apache Tribe v.*

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[36]Also cited was Justice Stevens' concurrence in *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505, 515, 111 S.Ct. 905 (1991) (Stevens, J. concurring), suggesting that sovereign immunity might not extend "to claims for prospective equitable relief against a tribe." *Ysleta*, 181 F.3d at 680.

[37] 25 U.S.C. §§ 2701-21 (1994).

State of New Mexico, 131 F.3d 1379 (10th Cir. 1997), adopting a mid-way position between Ysleta and Seminole Tribe. This was an action by a tribe to compel the state of New Mexico to negotiate in good faith to achieve a compact permitting gaming on the reservation pursuant to IGRA. The State filed a counterclaim against the tribe seeking a declaration that the gaming compact was invalid. The tribe responded to the counterclaim, asserting that the court lacked jurisdiction by reason of the tribe's sovereign immunity. Upon reviewing the district court's rejection of the tribe's defense, the Tenth Circuit concluded:

> While there is sparse case law on the issue it appears the majority supports the view that IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and *where only declaratory or injunctive relief is sought.*

131 F.3d at 1385 (emphasis added).

The issue of whether sovereign immunity would bar an action for injunctive relief in other contexts beyond compliance with IGRA was not addressed in Mescalero. The Eleventh Circuit rejected the reasoning of the Tenth Circuit in finding that a tribe engaging in gaming under the IGRA waives it sovereign immunity, opting for a stricter standard to determine when a tribe "expressly and unequivocally" waives immunity. Seminole Tribe, *supra*, 181 F.3d at 1243. But this appears to be the minority position.

The Supreme Court of South Dakota recently observed that: "A majority of courts conclude that IGRA waives tribal sovereign immunity in instances where compliance with IGRA is at issue and *where only declaratory or injunctive relief is sought.*" *Calvello v. Yankton Sioux Tribe*, 1998 SD 107, 584 N.W.2d 108, 114 n.4 (S.D. 1998) (emphasis added) Recent federal district court decisions in the Eighth Circuit have concluded that a tribe is not shielded from suit where the relief sought is equitable in nature. Most, like *Calvello* and *Mescalero, supra.*, are in the context of a case where compliance with the provisions of IGRA are at issue.[38] These cases recognize that IGRA does not provide for an express

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[38] Courts have found a waiver of tribal sovereign immunity under the enforcement provisions of other federal acts where an "unequivocal expression" of such waiver is

waiver of tribal sovereign immunity. The cases are consistent in noting the distinction in the type of relief requested and determining that a tribe will only be guaranteed immunity from suit where there is a claim for damages.

In *Ross v. v. Flandreau Santee Sioux Tribe,* 809 F.Supp.738 (D.S.D.1992), members of the tribe challenged the tribe's distribution of casino profits. The tribe moved for dismissal on the ground of sovereign immunity. The court ruled that it had jurisdiction but only with regard to equitable relief and that "tribal sovereign immunity protects the Tribe from entry of a judgment for monetary damages…", 809 F.Supp.at 745.

In *Rita, Inc., v. Flandreau Santee Sioux Tribe*, 798 F.Supp. 586 (D.S.D.1992), the management company for a casino operated by the tribe sought a temporary restraining order to prevent the tribe from removing the company as manager. The district court, over the objections of the tribe, found it had federal question jurisdiction under the IGRA but denied the requested injunction because the plaintiff failed to show the likelihood of success on the merits. The court did not discuss the issue of the tribe's sovereign immunity, apparently because only injunctive relief was requested.

The District Court for the District of Minnesota has likewise held that "when an Indian tribe engages in gaming governed by the IGRA, it waives its immunity to suit for the narrow purpose of determining compliance with the requirements of the Act." *Maxam v. Lower Sioux Indian Community of Minnesota*, 829 F.Supp. 277, 281 (D.Minn. 1993). *Maxam* was another case of tribal members suing the tribe over the distribution of gaming profits. In considering the plaintiffs' claims for both injunctive relief and money damages the court held that:

> [T]his court likely has jurisdiction to hear the present request for equitable relief. The court's exercise of jurisdiction for purposes of this motion is confined to consideration of a request for injunctive relief. The court does not today consider plaintiffs' separate claims seeking

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lacking. Osage Tribal Council v. U.S.Dept. of Labor, 187 F.3d 1174 (10th Cir. 1999), Safe Drinking Water Act; Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094,1097 (8th Cir.1989), Resource Conservation and Recovery Act,; Atlantic States Legal Foundation v. Salt River Pima-Maricopa Indian Community, 827 F.Supp. 608 (D.Ariz. 1993), Clean Water Act and Resource Conservation and Recovery Act.

> money damages. The Supreme Court in *Potawatomi* held by implication that a tribe's sovereign immunity from actions for money damages 'does not necessarily extend to actions seeking equitable relief.'.

Maxam, 829 F.Supp. at 281-82, citing *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 516, 111 S.Ct. 905. 913 (1996), (Stevens, J., concurring).

Calvello v. Yankton Sioux Tribe, 899 F.Supp. 431 (D.S.D. 1995), App. Dis., 89 F.3d 840, demonstrates the close connection between the question presented in *C&L Enterprises, Inc., v. Citizen Potawatomi Nation*, 00-292, *supra*, and the question presented here. In *Calvello* the plaintiff was the former manager of a tribal casino who sued the tribe to enforce an arbitration award. The court found that because the contract with the manager contained an arbitration clause, but not a clause specifically reserving the tribe's sovereign immunity, that agreement to submit disputes to arbitration constituted "an unequivocal expression of the Tribe's waiver of sovereign immunity…and the Tribe's consent to confirmation of any arbitration award in federal court." 899 F.Supp. at 435-436.[39] Further, while the court found that there was not a sweeping waiver of sovereign immunity for all matters involving gaming under IRCA, "that federal courts may find a waiver of tribal sovereign immunity for the purpose of enforcing the provisions of the IRCA where prospective injunctive relief, and not *monetary relief, is sought." Id. at* 437-438. *(emphasis added)*

These Eighth Circuit district court opinions[40] all emphasize the distinction between actions against a sovereign for prospective equitable relief and those for money damages. As the Fifth Circuit noted in *Ysleta, supra*, it is a distinction that is "eminently sensible". 181 F.3d at 680. That distinction was recognized by this Court in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908), which "held that the Eleventh Amendment does not bar suit in federal court against a state official for the purpose of

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[39] The court found the contract to be null and void, and thus the waiver of sovereign immunity in the arbitration clause to be inoperable, because it had not been approved in accordance with the IRCA.

[40] The Eighth Circuit dismissed the appeal in Calvello but took no action in the other cited cases.

obtaining an injunction against his enforcement of a state law alleged to be unconstitutional..." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156-57 n. 6, 98 S.Ct. 988, 993-94 n. 6 (1978). In *Edelman v. Jordan*, 415 U.S. 651 (1974), this Court re-affirmed the *Ex parte* Young doctrine reversing a lower court order requiring state officials to pay out illegally held welfare benefits finding this to be indistinguishable from an award of damages against the state itself. However, expenditures by the state in order to comply with a court order for prospective relief are not barred.

As stated above, the Ninth Circuit did not directly address the nature of relief sought by Petitioners in deciding that the sovereign immunity of the Hopi Tribe barred their claim against the United States. However, by implication it ruled that the type of relief sought does not make a difference as to whether a tribe's sovereign immunity shields it from suit. The Ninth Circuit previously considered this issue. In *Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), the court ruled that while tribes are immune from suit "tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law." 924 F.2d at 901. But this exception has not been extended to provide for suit against the tribe itself when only prospective equitable relief is being sought. [41]

However, the Ninth Circuit has recognized, in analyzing the Rule 19 question as it relates to an absent tribe, the distinction between a claim for a tangible commodity and a claim seeking prospective injunctive relief. In *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990), the court ruled that absent tribes were indispensable to a suit seeking a higher quota of a salmon catch but were not necessary parties to a request for injunctive relief based on a challenge to the legality of the regulatory process which led to the establishment of the quota. *Id.* at 559.

And in *Burlington Northern, supra.*, the Ninth Circuit seemed to suggest that a suit to test the constitutionality of a statute should not be barred by tribal sovereign immunity. At issue in the case were taxes the Blackfeet Tribe was imposing on the railroad's right of way. The Ninth Circuit stated that "sovereign immunity does not extend to officials acting

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[41] See also: *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985) (suit for declaratory and injunctive relief, as well as damages, barred by tribal immunity.)

pursuant to an allegedly unconstitutional statute." 924 F.2d at 901. It is unclear from the decision whether the court is saying that tribal officials acting in violation of federal law are not shielded from suit or whether sovereign immunity must give way to a challenge to the constitutionality of a law:

> We...conclude that tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law. ... Accordingly, tribal officials are not immune from suit to test the constitutionality of the taxes they seek to collect.
>
> *Id.* 901-902

This principle derives from *Ex parte Young, supra,* and its progeny which stand for the proposition that sovereign immunity does not shield an official from an injunction to prevent actions in violation of the Constitution. The Ninth Circuit, however, failed to acknowledge that Petitioners' claim for prospective equitable relief is to be judged differently than claims for damages when determining if sovereign immunity shields tribes and tribal officials for suit. Petitioners' claims challenge the constitutionality of a federal statute and the entire relief they ask for is prospective and equitable in nature.

The recent rulings of the Fifth, Tenth, and district courts in the Eighth Circuits in the above cited decisions seriously question the viability of a tribe's defense of sovereign immunity when measured against a claim that challenges the constitutionality of a federal statute and only seeks prospective equitable relief. The failure of the Ninth Circuit to even address this important issue in analyzing the defense of tribal sovereign immunity brings the Ninth Circuit into direct conflict with other circuits. As with the arbitration clause/tribal sovereign immunity question presented in *C&L Enterprises, Inc., supra.,* now accepted for review by this Court, the question presented in this case calls for clarification. This Court should take the opportunity to state with precision the parameters of tribal sovereign immunity in a way that will clearly answer both questions.

II. The Ninth Circuit Decided an Important Federal Question: When Can the United States Adequately Represent the Interest of an

Indian Tribe that Chooses to Absent Itself From a Lawsuit -- in a way that Conflicts with Decisions of this Court and of the Ninth Circuit Itself

In their briefs to the Ninth Circuit Petitioners and Respondents both asserted the Hopi Tribe was not a necessary party pursuant to Rule 19(a).[42] However, assuming *arguendo* that the Tribe is a necessary party, Petitioners and Respondents also agreed that the United States could adequately represent the Tribe's interests.

In various contexts this Court has determined that the United States may represent the interests of a tribe while at the same time fulfilling another congressionally mandated responsibility . In *Nevada v. United States*, 463 U.S. 110 (1983), this Court stated:

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[42] In brief, Petitioners argument that the Hopi Tribe is not a necessary party is this: This Court has held that practical considerations, rather than a rigid formalistic approach, determine whether a case is to be dismissed under Rule 19 for failure to join a necessary party. A court must carefully examine the specific facts of a case in determining the actual likelihood of prejudice to the absent party. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733 (1968).The Ninth Circuit did not examine this case pragmatically and made its decision in the absence of factual findings on the record, relying on assumptions Petitioners had no opportunity to challenge.

The issue is whether the Hopi Tribe has a cognizable legal interest absolutely requiring joinder under a *practical-minded* application of a *discretionary* federal rule. Petitioners make no claim against the Hopi Tribe. Rather they seek to enjoin their involuntary relocation by Respondents pursuant to federal statute which Petitioners' allege violates their constitutional rights. Petitioners do not seek a to enjoin the Hopi Tribe from taking any action or a declaration that the Tribe is not the beneficial owner of the HPL. If the 1974 Settlement Act's relocation requirement is found to violate Petitioners' constitutional rights, and the federal government is enjoined from involuntarily relocating them,Petitioners would receive all the relief for which they prayed.

Unlike the situation in *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999), the sole case cited by the Ninth Circuit in dismissing Petitioners' claim, Petitioners do not challenge the Accommodation Agreement, or seek to prohibit the Hopi Tribe from fulfilling its obligations under the U.S.-Hopi Settlement Agreement, or to deprive the Tribe of the compensation it has received from the United States pursuant to the Agreement. Petitioners only challenge the constitutionality of the federal statute which prohibits the free exercise of their religion. The circuit panels' assumption that this relief would undue or damage either the Accommodation Agreement or the U.S.-Hopi Settlement Agreement is simply incorrect.

> [I]t may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well. In this regard the Government cannot follow the fastidious standards of a private fiduciary.

463 U.S. at 127-128.

Similarly, in *Arizona v. California*, 460 U.S. 605 (1983), this Court held that tribes were not relieved from the res judicata effect of a judgment merely because the government represented both the tribes and those who competed with them. The instant case does not present that more complex circumstance. Numerous federal courts have followed the above cited decisions of this Court in finding that the federal government may represent the interests of a tribe or group of Indians while at the same time representing another potentially conflicting public interest.[43]

In this case Congress, in the 1974 Relocation Act, directed the federal government to both relocate the Navajos from land partitioned to the Hopi Tribe and at the same time to protect the rights of individual Navajos, including Petitioners. The federal Respondents joined with Petitioners below in their position that the United States could adequately represent the interests of the Hopi Tribe even if the Hopi Tribe was a necessary party.[44] The panel, without analysis, evidence in the record or

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[43] *Southwest Center, supra; Washington, supra; White Mountian Apache Tribe v. Clark*, 604 F.Supp. 185 (D.Ariz 1984); *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921 (9th Cir. 1986); *Blackfeet Indian Nation v. Hodel*, 634 F.Supp. 646 (D.Mont. 1986). [MORE CITES]

[44] The Ninth Circuit has held that: "If a legally protected interest exists, the court must further determine whether that interest will be impaired or impeded by the suit. Impairment may be minimized if the absent party is adequately represented in the suit, The United States may adequately represent an Indian Tribe unless there is a conflict of interest between the United States and the tribe." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). .

factual findings by the District Court rejected the parties' joint position that there is no conflict between the United States and the Hopi Tribe for two reasons. First, because panel believed that the United States took a different position in the district court.[45] Second, the panel assumed that because the United States is trustee for the Hopi Tribe and for the individual Indian Petitioners it could not represent the Tribe's interest because-it "would stand on both sides of the question." But the panel failed to explain how a conflict might actually occur within the context of this lawsuit. Previously, the Ninth Circuit has criticized district courts that determined, without analysis of the specific interests at stake, that the United States could not represent the interests of absent tribes:

> The district court also *suggested, without elaboration or explanation,* the possibility of conflict arising from the federal government's potentially inconsistent responsibilities under its trust obligations and the applicable environmental laws. Neither the district court nor any of the parties *has explained how such a conflict might actually arise in the context of Southwest's suit.* They identify no argument the United States would not or could not make on the Community's behalf, and suggest no "necessary element" the Community alone could present.

Southwest Center for Biological Diversity v. Babbitt, 150 F.3d 1152, 1153-1154 (9th Cir. 1998); *Washington v. Daley*, 173 F.3d 1159, 1168 (9th Cir. 1999).(emphasis added)

Identical to the conclusion of the district courts in *Southwest Center* and *Washington*, reversed by the Ninth Circuit, the panel here assumed a *potential* conflict between the Hopi Tribe and the United States without analyzing the question or providing an example of how such a conflict might actually arise in the context of this lawsuit.[46] Indeed, the

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[45] In their original appellate brief Defendants did assert that the Tribe was indispensable because it is the beneficial owner of the land in question. However, Defendants did not address the adequacy of representation issue

[46] The panel ignored prior Ninth Circuit decisions applying a three-part test to determine if an existing party to a lawsuit can adequately represent an absent one, and finding a non-party adequately represented if: (1) the interests of the existing parties are such that they would undoubtedly make all of the non-party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect. *Southwest Center,*

Tribe itself was unable to identify a single specific argument the United States had not or would not make on its behalf, other than that "the federal defendants are unwilling to assert the Tribe's argument that it is an indispensable party to this litigation." (Second Supplemental Brief of Hopi Tribe at 5). Previously, the Ninth Circuit explicitly rejected this as a reason for finding that the absent party was not adequately represented, characterizing such an approach as "circular." *Southwest Center, supra,* 150 F.3d at 1154.

The trust interests of only one tribe, the Hopi, are present in this action. Petitioners are Navajo Indians but, as the panel's opinion recognizes, the instant lawsuit implicates no "interests of the Navajo Nation itself." Petitioners are asserting individual constitutional rights. As the federal Respondents noted: "[B]ecause the claims the individuals assert concern their individual constitutional rights, not trust obligations relating to a *res*, the federal government does not face divided trust obligations between the Plaintiffs and the absent Hopi Tribe." (Sup. Brief of the Federal Appellees on the Indispensable Party Issue at 11-14) Before Petitioners' First and Fourteenth Amendment claims are dismissed the specific nature and extent of the trust duties present in this case is deserving of a detailed examination and analysis which the Ninth Circuit failed to provide.

The circuit court panel finds a conflict, between the general trust responsibility owed to the Hopi Tribe and the federal government's duty to protect the rights and property of those Navajo individuals who are awaiting relocation, so great that it requires dismissal of Petitioners' lawsuit. But neither the panel or the Hopi Tribe has identified how such a conflict might actually arise in the context of this lawsuit.

Despite the fact that the United States agrees with Petitioners that it can adequately represent the Tribe, and the Tribe itself can identify no concrete example of how a conflict might actually arise within the context of this case (except for differing positions on the Rule 19 question itself), the panel, without evidence or factual findings, presumes a conflict exists. The United States' trust relationship is meant to benefit Indians yet the

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supra, 1153 - 1154; *Washington, supra,* 1167; *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980); *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir 1992).

cruel irony is that Petitioners are denied their only opportunity for adjudication of their First and Fourteenth Amendment claims solely because they are "beneficiaries" of Respondents' trust responsibility.

In this case the United States is not called upon to represent diverging trust interests. As a matter of law, the United States is capable of representing the absent Hopi Tribe in this case.

III. The Hopi Tribe Through Its Actions and Conduct Has Waived its Sovereign Immunity or Should be Estopped from Using its Immunity to Deny Petitioners Access to the Only Forum Available to Them to Test the Constitutionality of the 1974 Relocation Act

Even if the Hopi Tribe has an interest recognized under Rule 19(a)(2) this does not require that the Tribe must be joined. [47] Lawsuits in which individuals aver that Congress has acted in violation of their constitutional rights have been permitted by this Court to proceed in the absence of interested tribes.[48] Furthermore, the unique facts of this case raise serious questions as to whether the Hopi Tribe should be estopped from asserting that it is an indispensable party.

The Hopi Tribe entered its appearance as amicus as soon as the lawsuit was filed in 1988. It has since actively participated at each stage of the litigation and related settlement negotiations. When the United States Court of Appeals for the Ninth Circuit ordered this case into mediation the Hopi Tribe accepted the Court's invitation to participate and was included as a full participant at all stages of the mediation.

More importantly, through the *Manybeads* mediation the Hopi Tribe itself negotiated, drafted and signed two separate settlement agreements, the Accommodation Agreement and the U.S.-Hopi Settlement

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[47] "[T]he fact that a tribe has an interest in the litigation is ot enough in itself to make it a necessary party in the sense of Rule 19." *Thomas v. United States*, 189 F.3d 662, 668 (7th Cir. 1999). See also *Washington, supra.*, at 1167-69; *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C.Cir. 1986).

[48] See, e.g. *Babbitt v. Youpee*, 519 U.S. 234 (1997) (constitutional challenge by individual Indians that statute, Indian Land Consolidation Act, providing that certain interests in allotted lands should escheat to tribe upon owner's death constituted a "taking"); *Hodel v. Irving*, 481 U.S. 704 (1987) (constitutional challenge to earlier Indian Land Consolidation Act).

Agreement, partially settled the *Manybeads* case while providing the Hopi Tribe with significant monetary benefits not otherwise available to it.[49]

It has been held that a tribe's waiver of sovereign immunity must be made explicitly and that appearing in a lawsuit as amicus does not constitute such a waiver. But here the Hopi Tribe's participation went far beyond simply providing the court with its positions through memoranda. It actively involved itself as a full participant in both the litigation and mediation process.

The Hopi Tribe also induced the Navajos to accept Hopi Accommodation Agreements with its promise that those individuals who signed the Accommodation Agreement could still pursue the merits of their appeal in federal court. The District Court endorsed the Tribe's offer, terming it a "win, win" situation. Petitioners and a significant majority of the other HPL Navajos relied on the Tribe's representations and the District Court's endorsement in weighing their decision to sign the AA. Petitioners were led by the Hopi Tribe to believe that signing the AA would not foreclose their opportunity to have their constitutional claims heard by the federal courts. Had Petitioners known that the Tribe would

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[49] The Settlement Agreement and the 1996 Act provide that funds be paid out in the following manner: (1) the Hopi Tribe will receive $2.4 million once the Tribe files a motion to dismiss its appeal in the Ninth Circuit in *Secakuku v. Hale*; (2) the Hopi Tribe will receive $22.7 million once legislation extending the Tribe's leasing authority to 75 years has been enacted and once the Tribe's claims in the Court of Federal Claims for damages due to any Federal action which occurred before 1982 are dismissed; (3) the Hopi Tribe will receive $10 million once 65% of the Navajo families residing on the Hopi reservation have signed an Accommodation Agreement or have chosen to relocate and once the Hopi Tribe's claims in the Court of Federal Claims for livestock trespass damages against the United States from 1983 through 1988 are dismissed; (4) the Hopi Tribe will receive $15.1 million once 75% of the Navajo families residing on the Hopi reservation have signed an Accommodation Agreement or have chosen to relocate and once the Hopi Tribe's claims in the Court of Federal Claims for livestock trespass damages against the United States from 1989 through and including 1996 are dismissed; and (5) once 85% of the Navajo families residing on the Hopi reservation have signed an Accommodation Agreement or have chosen to relocate, the Secretary shall take into trust for the Hopi Tribe up to 500,000 acres of rural lands in northern Arizona, consistent with the terms of the Settlement Agreement and the 1996 Settlement Act. See S. Rep. 104-363, 104th Cong. 2d Sess. at 35-47 (1996); See also Supplemental Brief of Federal Appellees at p. 3-6.

receive the benefits of its inducement and then continue to claim immunity from suit in order to force a dismissal of Petitioners' lawsuit, they surely would not have signed the Hopis' Agreements.

As a matter of federal law, an Indian tribe is subject to suit where it has waived sovereign immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702, 140 L.Ed. 2d 981 (1998). The Accommodation and Settlement Agreements negotiated in the *Manybeads* mediation were prepared and proposed by the Hopi Tribe. The Settlement Agreement incorporated the Accommodation Agreement and included an enforcement provision which clearly waived the Tribe's immunity from suit for purposes of enforcing the provisions of the agreement.

> The United States and the Tribe hereby agree that the provisions of this Settlement Agreement shall be enforceable in either the United States Court of Federal Claims in Washington, D.C., or in the United States District Court in Phoenix, Arizona, as appropriate. Settlement Agreement at p. 21 paragraph 10.

This language is very similar to the language in the arbitration agreement at issue in *C & L Enterprises, Inc. v. Citizen Potawatomi Nation*, 00-292, granted certiorari on October 30, 2000. Petitioners in that case argue that such language constitutes a waiver of tribal sovereign immunity, a position that has been accepted by the Seventh and Eight Circuit Courts of Appeal as well as the Arizona and Alaska Supreme Courts.

Under these circumstances the decision of the Ninth Circuit results in the inequity of permitting the Hopi Tribe to obtain the substantial benefits of its offer, and then once Petitioners accept, and then using its sovereign immunity as a sword to deny Petitioners access to the only forum available for adjudication of their constitutional claims.

While recognizing Petitioners will have no alternative forum for their constitutional claims if the action is dismissed for nonjoinder, the Ninth Circuit finds this factor outweighed because, it speculates that if the case goes forward and Petitioners prevail, the Tribe "will suffer substantially..." This decision conflicts with an earlier decision the of Ninth Circuit which recognized:

> [W]hether a judgment rendered in the person's absence will be adequate and whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder ... [are] ... the most relevant factors proposed by Rule 19(b)... [and the] ... most weighty in the circumstances of the case at bar.
>
> *Anrig v. Ringsby United,* 603 F.2d 1319, 1326 (9th Cir. 1978)

In *Prescription Plan Service Corp. v. Frances*, 552 F.2d 493 (2d Cir. 1977), the Second Circuit similarly reversed a lower court dismissal for lack of diversity jurisdiction on a finding that two parties were indispensable in a contract action. The circuit court reversed, stating that appellant had no satisfactory alternative in state court to bring his action. Indeed, the court held that even the possibility of a state forum was insufficient to cause dismissal as no evidence was presented that the same action could be brought against the same parties in state court. *Id.* at 497. Petitioners have no alternative forum to bring their constitutional claim should this Court not correct the Ninth Circuit's erroneous decision that the Hopi Tribe is indispensable to this litigation.

The only forum available to Petitioners to vindicate individual constitutional claims against the United States, as opposed to tribal interests, is the federal courts. The Hopi Tribe seeks to participate in and receive all the benefits of the litigation, mediation and legislative processes while at the same time, voluntarily absenting itself as a party and using its claimed immunity to deprive Petitioners' of their fundamental due process right to challenge the constitutionality of a federal statute which requires their involuntary relocation from their sacred homelands.

Under these circumstances the decision of the Ninth Circuit results in the inequity of permitting the Hopi Tribe to obtain the substantial benefits of its offer, and then once Petitioners accept, using sovereign immunity as a sword to deny Petitioners access to the only forum available for adjudication of their constitutional claims.

CONCLUSION

The above stated reasons Petitioners pray this Court accept grant their petition and agree to review these important issues.

Dated this 28th day of November, 2000.

TREBON & FINE, P.C.
JOHN TREBON
Attorney for Petitioners

No. _____

In The

Supreme Court of the United States

October Term, 2000

JENNY MANYBEADS, et al.
Petitioners,

v.

UNITED STATES OF AMERICAL, et al.
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUT

Jenny MANYBEADS, Yellowwoman Yazzie, Ashkie Bitsi, Irene Yazzie, Blanche Wilson, Waldine Yazzie, Dan R. Yazzie, Bessie Begay, Mae Wilson Tso, Askie Tso, Earl Tso, Sam W. Tso, Betty A. Tso, Fiona Tso, Joe Benally, Violet Ashkie, Louise Benally, Plaintiffs-Appellants,

v.

UNITED STATES of America, Donald P. Hodel, in his official capacity as Secretary of the Department of Interior, United States Department of the Interior, United States Bureau of Indian Affairs, et al., Defendants-Appellees.

No. 90-15003.

4/18/00

Members of Navajo Nation residing on land belonging to Hopi Tribe brought action against United States alleging that Navajo and Hopi Indian Land Settlement Act of 1974 violated their First Amendment right to freely exercise their religion. The United States District Court for the District of Arizona, Earl H. Carroll, J., 730 F.Supp. 1515, dismissed action, and members appealed. After Hopi Tribe and United States reached Settlement Agreement entitling Hopi Tribe to compensation, and after Hopi Tribe, Navajo Nation, and representatives of individual Navajos reached Accommodation Agreement limiting rights of Navajos residing on Hopi land, the Court of Appeals, Noonan, Circuit Judge, held that: (1) Tribe was necessary party, and (2) Tribe was indispensable party.

Affirmed.

Lee Phillips, Flagstaff, Arizona, for the plaintiffs-appellants.

Katherine Hazard, United States Department of Justice, Washington, D.C., for the defendants-appellees.

Tim Atkeson, Arnold & Porter, Denver, Colorado, for the amicus Hopi Tribe.

Appeal from the United States District Court for the District of Arizona; Earl H. Carroll, District Judge, Presiding. D.C. No. CV-88-0410-PCT-EHC.

Before: PREGERSON, NOONAN and THOMPSON, Circuit Judges.

NOONAN, Circuit Judge:

Jenny Manybeads et al., (Manybeads) appeal the dismissal by the district court of their suit against the United States. We affirm the dismissal for want of a necessary and indispensable party, the Hopi Tribe.

PROCEEDINGS

The past history of this litigation has recently been set out in Clinton v. Babbitt, 180 F.3d 1081 (9th Cir.1999). We need not repeat what we said there. Suffice to say that Manybeads challenged the constitutionality of 25 U.S.C.§ 640d et seq. (1994), contending that it violated the Free Exercise rights of the plaintiffs. The district court dismissed the complaint for failure to state a claim. On appeal, we arranged for mediation. A Settlement Agreement was reached between the Hopi Tribe and the United States and an Accommodation Agreement agreed to by the Hopi Tribe, the Navajo Nation, and representatives of individual Navajos. By this agreement, provision was made for plaintiffs here and
other Navajo families residing on Hopi land to obtain at no cost 75 year leases on homesites and farmlands within land awarded by court decree to the Hopi.

The Manybeads plaintiffs remaining in this case are dissatisfied with the Accommodation Agreement and press their contention that they are being denied religious freedom.

In the district court and now before us the Hopi Tribe argued that it is a necessary and indispensable party and that, as it has not waived its sovereign immunity and is not a party, the suit should be dismissed.

ANALYSIS

Fed. R. Civ. Proc. 19(a)(1) provides that a party is necessary if, in its absence, complete relief cannot be accorded those already parties. The Hopi Tribe is a necessary party here. Manybeads cannot be afforded complete relief without undoing the Accommodation Agreement, which limits the rights of Navajos on Hopi land, and without undoing the Settlement Agreement by which the Hopi Tribe is entitled to compensation for what is conceded to the Navajos.

The Hopi Tribe is also a necessary party in terms of Fed. R. Civ. Proc. 19(a)(2): it "claims an interest relating to the subject of the action and is so situated that the disposition of the action may (1) as a practical matter impair or impede" its ability to protect that interest. As we have held in Clinton, 180 F.3d at 1089, the Hopi Tribe qualifies as a necessary party under both parts of Rule 19(a).

[2] The Hopi Tribe is also indispensable as Rule 19(b) defines indispensability. A judgment in Manybeads' favor would upset two agreements, long and carefully worked out, by which a balance was struck between the interests of the Navajo Nation and the Hopi Tribe, peaceful relations between the two Indian sovereigns was secured, and substantial monetary compensation was obtained and is to be obtained by the Hopi Tribe. Manybeads argues that she is not attacking the two Agreements, only the 1974 statute that led to them. The practical effect, however, of what she seeks in having the 1974 statute invalidated would be the undoing of the Agreements to the substantial prejudice of the Hopi Tribe. No remedy or relief would lessen the prejudice. No judgment in the Hopi Tribe's absence will be adequate. Clinton, 180 F.3d at 1090.

One factor favors Manybeads. If the action is dismissed for nonjoinder, her Free Exercise claim will go unredressed. This factor is not a light one. Congress, the First Amendment proclaims, "shall make no law ... prohibiting the free exercise [of religion]." This freedom--the first freedom enshrined in the Bill of Rights--is fundamental in our structure of government. It is a freedom that has sometimes been successfully asserted against invasion by school boards, municipalities, and states. It has never been upheld by the Supreme Court when asserted against Congress. In principle there is no reason why it should not prevail against congressional intrusion. But this principle cannot be asserted when a sovereign, not a party to the case, will suffer substantially from its vindication.

The United States contends that it can adequately represent the Hopi Tribe, and that there is no need to join the missing sovereign. The contention is weak because it is the reverse of what the government contended in the district court. The contention is contradicted because the government is a trustee not only for the Hopi Tribe and the Navajo Nation but for the very plaintiffs in this case. By the explicit terms of 25 U.S.C. § 640d-9(c) and (d), the government must protect the property and personal rights of the individual Navajos subject to relocation. The government, if it undertook to act for the Hopi Tribe, would stand on both sides of the question. The government cannot represent the tribe. In so concluding, we do not suggest that it is the United States' trust responsibility to the Navajo Nation that creates a conflict of interest preventing the United

States from adequately representing the Hopi Tribe. There is no such conflict of interest because the Navajo Nation is not a party to this suit. This suit implicates only the interests of individual plaintiffs who are members of the Navajo Nation, and not the interests of the Navajo Nation itself.

A necessary and indispensable party is missing. The judgment of dismissal is AFFIRMED.

United States District Court for the District of Arizona

Jenny MANYBEADS, et al., Plaintiffs,
v.
UNITED STATES of America, et al., Defendants.

Civ. No. 88-410.

10/20/89

Navajo tribal members subject to relocation from Hopi Indian Reservation under authority of Navajo-Hopi Land Settlement Act challenged such action on various statutory and constitutional grounds. On parties' motions, the District Court, Carroll, J., held that: (1) Act did not violate tribal members' right to free exercise of religion; (2) relocation of tribal members did not violate their equal protection rights; (3) Act and its implementing programs did not reflect federal abdication of trust responsibilities vis-a-vis Indian religious right; and (4) relocation of tribal members under authority of Act would not violate international law.

Dismissed.

Lee Brooke Phillips, Matt Strassberg, Big Mountain Legal Office, Flagstaff, Ariz., Terry Gross, Rabinoitz, Boudin, Standard, Krinsky & Lieberman, New York City, Bruce Ellison, Rapid City, S.D., for plaintiffs.

Richard S. Alleman, U.S. Atty., Phoenix, Ariz., Steven Carroll, U.S. Dept. of Justice, Land & Natural Resources Div. Indian Resources Section, Washington D.C., for defendants.

OPINION AND ORDER DENYING PRELIMINARY INJUNCTION AND DISMISSING ACTION

CARROLL, District Judge.

Plaintiffs (47 in number) are Navajo Tribal members residing on that part of the Hopi Indian Reservation identified as Hopi Partitioned Lands (HPL) and subject to relocation from that reservation pursuant to the provisions of the Navajo-Hopi Land Settlement Act, 25 U.S.C. § 640d et seq., Pub.L. 93-531, Dec. 22, 1974, 88 Stat. 1712, and as subsequently amended. (FN1)

Defendants are the United States of America, Donald P. Hodel, in his official capacity as Secretary of the Department of Interior, United

States Department of the Interior, Ross O. Swimmer, in his official capacity as Assistant Secretary of the Department of the Interior, United States Bureau of Indian Affairs, Hawley Atkinson, in his official capacity as Chairman of the Navajo-Hopi Indian Relocation Commission and the Navajo-Hopi Indian Relocation Commission.

Plaintiffs assert seven reasons (claims) why they, and other Navajo Tribal members residing on the Hopi Reservation and with similar religious beliefs and practices, have the right for themselves and their heirs in perpetuity, to reside on the Hopi Reservation on what they consider their extensive customary use areas, with unlimited grazing privileges, the right to construct such buildings as they wish, and to utilize unlimited water claimed necessary to their needs:

First Claim --Violation of Right to Free Exercise of Religion;

Second Claim --Violation of the American Indian Religious Freedom Act;

Third Claim --Violation of Equal Protection;

Fourth Claim --Violation of Federal Trust Responsibility;

Fifth Claim --Violation of Right to Freedom of Religion under Customary International Law and the United Nations Charter;

Sixth Claim --Violation of International Prohibition Against Genocide;

Seventh Claim --Violation of Plaintiffs' Rights Under Article 73 of the United Nations Charter as a Non-Self-Governing People.

Plaintiffs seek a declaratory judgment establishing each of these claims, as well as injunctive relief:

Preliminarily and permanently enjoining defendants from relocating plaintiffs, from interfering with structures essential to plaintiffs' religious practices, from threatening or harassing plaintiffs, from disrupting plaintiffs' water supply, from interfering with plaintiffs' livestock and housing, from engaging in behavior or activities which coerce plaintiffs to leave their ancestral homelands, and from engaging in or authorizing programs or other actions which deprive plaintiffs of the livestock and housing necessary to sustain themselves on their ancestral homelands.

Defendants filed a Motion to Dismiss which has been fully briefed and is pending decision by this Court.

Plaintiffs' Application for a preliminary injunction was heard October 4, 5, 6 and 7, 1988. The evidence presented in Attakai v. United States, CIV 88-964 PCT EHC, has been incorporated in this proceeding. The parties have each filed proposed findings of fact and conclusions of law and post hearing briefs.

The motions to dismiss and for a preliminary injunction involve common issues and accordingly this Order will address both motions. For the reasons set forth in this Order, the Motion for a Preliminary Injunction will be denied and defendants' Motion to Dismiss will be granted.

1. Plaintiffs Have No First Amendment Claims

[1] The Free Exercise Clause of the First Amendment is the putative basis for plaintiffs' claims that the Navajo-Hopi Relocation Act is unconstitutional and that they have the right to remain in perpetuity on property held in trust by the United States for the exclusive use of the Hopi Tribe. If there was ever any basis for asserting such contentions (see Bowen v. Roy, 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986)) they were put to rest by the United States Supreme Court in Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988). Lyng provides direct and dispositive answers to the plaintiffs' First Amendment claims. The holdings of Lyng are the law of this country--whether or not personally acceptable to plaintiffs or those who espouse their cause.

The principal issue in Lyng was whether the Free Exercise Clause prevented the government from constructing a road through a portion of a National Park "that has traditionally been used for religious purposes by members of three American Indian Tribes." In concluding that the Free Exercise Clause neither restrained the government in such instance nor required it to demonstrate a compelling need to use its property for building a road in the manner contemplated, the Court held, in substance:

A court cannot weigh the adverse affects of a program on one religion and compare them with the adverse effects of some other program on a different religion;

The fact that a person's ability to practice their religion will be virtually destroyed by a governmental program does not allow them to impose a religious servitude on the property of the government [much less

property which the government holds in trust for another sovereign Indian tribe];

The nature of the religious rights claimed cannot create a de facto beneficial ownership of public (or private) property, in order to practice ones religion.

However much plaintiffs, or those with similar interests may desire to permanently reside where they now do, i.e., on lands partitioned to the Hopi Tribe, that option is
not available to them. (FN2) To hold otherwise would afford plaintiffs rights, benefits and privileges not enjoyed by other citizens. The rights claimed by plaintiffs in Hopi lands are in total derogation of Hopi rights in and to their reservation.

The Navajo-Hopi Land Settlement Act and the many cases decided with respect to that Act are not unconstitutional. Neither the Act itself nor court cases construing the Act prohibit the free exercise of religion by any of the plaintiffs. As held in Lyng:

Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will 'virtually destroy the Indians' ability to practice their religion,' [North West Indian Cemetery Protective Association v. Peterson] 795 F.2d [688] at 693 [(9th Cir.1986)] (opinion below), the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities--from social welfare programs to foreign aid to conservation projects--will always be considered essential to the spiritual wellbeing of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent it is feasible, is for the legislatures and other institutions.

108 S.Ct. at 1326.

As referenced in footnote 2, Congress provided in 25 U.S.C. § 640d-5(c) that:

In any division of the surface rights to the joint use area, reasonable provision shall be made for the use of and right of access to identified religious shrines for the members of each tribe on the reservation of the other tribe when such use and access are for religious purposes.

It is significant that neither tribe has claimed that this requirement was ignored in the partition process. Following partition, each tribe filed (under seal) a designation of their religious shrines. The Court has not been requested by either tribe to enter any further order directed to this statutory provision.

Section 640d-20 addresses these same religious concerns following partition:

Notwithstanding anything contained in this subchapter to the contrary, the Secretary shall make reasonable provision for the use of and right of access to identified religious shrines for the members of each tribe on the reservation of the other tribe where such use and access are for religious purposes.

Again, these rights may not satisfy plaintiffs--but, suffice it to say--they far exceed rights of access afforded to any other religious group in this country. These rights are enforceable; however, they do not divest the government (or a property owner) "of its right to use what is, after all, its land." Lyng, 108 S.Ct. at 1327.

2. There is No Violation of the American Indian Religious Freedom Act (AIRFA)

Lyng also addressed and rejected contentions similar to those asserted by plaintiffs in their second claim for relief, i.e., that their interpretation of the First Amendment was enacted into statutory law. The Court noted: "Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights." Id., at 1378.

3. Equal Protection Claim is Meritless

Plaintiffs claim that their rights have been violated because in other instances (citing the Pueblo Lands Act of 1924 and the Alaska

Native Claims Settlement Act of 1971) white settlers were allowed to remain on public lands and the Indian claimants were given monetary compensation. This argument is disingenuous here where the joint property owners were two Indian Tribes.

The essential issue whether to partition the lands in kind or to give more lands to one tribe and give greater monetary compensation to the tribe receiving the unequal (lesser) land area was in the first instance, a political decision. Congress specifically directed (25 U.S.C. § 640d-5(d)):

(d) In any partition of the surface rights to the joint use area, the lands shall, insofar as is practicable, be equal in acreage and quality: Provided, That if such partition results in a lesser amount of acreage, or value, or both to one tribe such differential shall be fully and finally compensable to such tribe by the other tribe. The value of the land for the purposes of this subsection shall be based on not less than its value with improvements and its grazing capacity fully restored: Provided further, That, in the determination of compensation for any such differential, the Federal Government shall pay any difference between the value of the particular land involved in its existing state and the value of such land in a fully restored state which results from damage to the land which the District Court finds attributable to a failure of the Federal Government to provide protection where such protection is or was required by law or by the demands of the trust relationship.

The Mediator and later the District Court partitioned the lands "on the basis of fairness and equity" (25 U.S.C. § 640d-7(b)). In this process, the district court considered other alternatives, including compensation, to partition. The Ninth Circuit agreed with the district court's decision that partition was "the only practicable solution":

We affirm the decision to partition the Joint Use Area. That resolution was recommended by the mediator, envisaged by Congress, and has long been seen as the most likely means of fully effectuating the legal rights of the Hopi and resolving this controversy.

Sekaquaptewa v. MacDonald, 575 F.2d 239, 245 (9th Cir.1978). This determination is res judicata and is not subject to collateral attack by the individual tribal members. See also 25 U.S.C. § 640d-7(a). In point of fact, this was a tribal claim that was never available to individual tribal members to assert in their own names. Plaintiffs have not been denied equal protection of the laws and their due process rights have not been violated.

4. Federal Trust Responsibilities Not Violated

Plaintiffs assert (Complaint p. 54) that the "United States and its officials, including all defendants herein, are required to protect and preserve the religious rights of plaintiffs" and that:

136. The proposed conduct and actions of defendants to relocate plaintiffs from their ancestral home and medicine lands will constitute a violation of this trust relationship.

This is in the main but a rescript of plaintiffs' earlier First Amendment issues. This claim serves no purpose, apart from affording plaintiffs an opportunity in their complaint to allege a number of argumentative propositions--irrelevant to the issues at hand--having to do with plaintiffs' perceptions
as to enactment of the Relocation Act and inferring that prior to that Act the Hopis and Navajos co-existed peacefully on what had been the joint use area. (Complaint, pp. 44-47). Without extending this discussion, a reading of Healing v. Jones, 174 F.Supp. 211 (D.Ariz.1959), and Healing v. Jones, 210 F.Supp. 125 (D.Ariz.1962), aff'd, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963), will be instructive to those interested in how these inter-tribal problems developed post-1882. As noted in Hamilton v. MacDonald, 503 F.2d 1138, 1146 (9th Cir.1974), problems between the tribes continued unabated after Healing, culminating in Congress authorizing partition of the joint use areas by the 1974 legislation: (FN3)

The district court determined that the Hopi had been ousted, and that finding is not clearly erroneous--indeed, it is more than amply supported by the evidence. A careful review of the record reveals that the Hopi Tribe made demands for use of its joint interest to both the government and the Navajo Tribe, but that it has been excluded wrongfully from any but an insubstantial use of the joint use area by the acts of members and officials of appellant [Navajo] Tribe and of government officials.

The Government has a trust obligation to both tribes. It failed to fairly act to protect the Hopi rights for many, many years. Congress and the Courts--at Congress' direction--were ultimately required to resolve the disputes between these two tribes.

The Navajo-Hopi Land Settlement Act was enacted after extended Congressional hearings and has been amended to address particular programs or concerns of the involved tribes. Many members of the Navajo Tribe have relocated from the Hopi lands after partition pursuant to the Act, as have most of the relatively few Hopi families living on the

lands partitioned for exclusive use of the Navajo Tribe. Programs are in place to provide counselling to persons who must relocate and to advise those persons about their rights as relocatees. These assistance and advisory programs do not violate the constitutional rights of the relocatees. On some occasions, an employee of a government agency may have done something that offended one of the relocatees or members of their family, either with respect to the time or place of the meeting, or information concerning relocation procedures. There is nothing to suggest that these discussions were coercive in character or purpose, or that they require supervision by the Court. Relocation, with one exception FN4)--under the Navajo-Hopi Land Settlement Act is not now, and it has never been--a voluntary undertaking by members of the Hopi Tribe residing on lands partitioned to the Navajo tribe, or by members of the Navajo Tribe residing on lands partitioned to the Hopi Tribe. In the event a person (family) subject to relocation does not participate in and complete relocation, he or she is subject to relocation (eviction) when a "new or replacement home" is provided for their household. See 99 Stat. 1257; 100 Stat. 1783-278.

5. International Law and United Nations Charter claims are legally frivolous

Claims Fifth, Sixth and Seventh are, to adopt a phrase used by another court, "far
fetched." (FN5)

International law in general is relevant only where there is no treaty and no controlling executive or legislative act or judicial decision. Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.1986), cert. denied, Ferrer-Mazorra v. Meese, 479 U.S. 889, 107 S.Ct. 289, 93 L.Ed.2d 263 (1986).

The United Nations Charter is not a "self-executing international obligation of the United States." Spiess v. Itoh & Co. (America), Inc., 643 F.2d 353, 363 (5th Cir.1981); Restatement of the Law (Third), The Foreign Relations Law of The United States, § 701, p. 156. The Navajo-Hopi Land Settlement Act was enacted in the interest of this nation. It is not overridden by the United Nations Charter.

More directly, the Navajo-Hopi Settlement Act and programs implementing that Act do not violate plaintiffs' rights under customary international law or the United Nations Charter. Recognizing the difficult problems to be resolved between the interests of the two tribes to lands that each had the right to co-equal use prior to partition, Congress acted to protect the interests of both tribes. Relocation benefits, if not acceptable to

these plaintiffs, would be the envy of countless millions in other countries. The Court's remarks in Hamilton, 503 F.2d at 1145, are as true today as they were when written in 1974:

This is poor men against other poor men, fighting against a long historical backdrop for an over-grazed, harsh, and inhospitable area which yields little above a subsistence living. Both tribes have historical claims to the area, and both undoubtedly have present economic need. Any solution is inevitably bound to cause suffering. The Order of Compliance and implementation plans attempt to minimize the economic dislocation caused the Navajo sheepherders, but the district court obviously cannot at the same time implement the decree protecting Hopi interests and not visit hardships on the Navajo, who presently use the entire area. Were the issues res nova, we could not say that the equal division struck was an abuse of discretion.

The United States Senate ratified the Genocide Convention in 1987, with three understandings and one declaration. The "Genocide Convention Implementation Act of 1987 (The Proxmire Act)" appears in the Criminal Code as 18 U.S.C. § 1091, et seq. Only the most partisan of advocates would argue that the Navajo-Hopi Land Settlement Act or subsequent amendments violate in word or spirit the Genocide Implementation Act of 1987:

(a) Basic offense.--Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such--

(1) kills members of that group;

(2) causes serious bodily injury to members of that group;

(3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture or similar techniques;

(4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;

(5) imposes measures intended to prevent births within the group; or

(6) transfers by force children of the group to another group; or attempts do so, shall be punished as provided in subsection (b).

If the Act was otherwise applicable--which it is not --section 1092 provides that nothing in the Act should "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding."

CONCLUSION

The Court finds that plaintiffs have failed to establish either the likelihood of eventual success on the merits as to any of their claims, or that serious questions are raised and the balance of hardships tips sharply in their favor. See Johnson Controls, Inc. v. Phoenix Control Systems, Inc., 886 F.2d 1173, 1174 (9th Cir.1989). In this instance, the public interest would not be advanced by granting of what would be an improvident preliminary injunction.

ACCORDINGLY,

IT IS ORDERED denying plaintiffs' Motion for Preliminary Injunction.

IT IS FURTHER ORDERED granting defendants' Motion to Dismiss.

IT IS FURTHER ORDERED that Judgment be entered that plaintiffs take nothing by reason of their complaint.

(FN1.) This action was originally filed January 26, 1988 in the United States District Court for the District of Columbia. The case was transferred to this district on defendants' motion. Judge Gesell concluded at pg. 5 of the transfer order, "That there are therefore, strong policy reasons to have all aspects of the Hopi-Navajo controversy coordinated and resolved in a single federal district. Congress has recognized this through the statutory scheme it enacted and the dictates of judicial economy and common sense so require."

(FN2.) Here there are compelling reasons to partition the land and to conclude the relocation process. Many Navajo families have relocated; range restoration and livestock reduction projects have been implemented; lands have been purchased and made a part of the Navajo Reservation to accommodate relocatees; substantial amounts have been appropriated and expended during the period 1958 to date for all of these purposes. Importantly, the completion of the relocation will encourage all interested parties to go on with their lives and make necessary adjustments to their

new environments. An important result will be that the Hopi Tribe will finally attain exclusive jurisdiction over their entire reservation, to use, manage and control, subject of course to the privileges which enure to the Navajo Tribe, and to its members, pursuant to 25 U.S.C. § 640d-20; 640d-5(c) (right of members of each tribe to use and access to identified religious shrines on the reservation of the other tribe).

(FN3.) See also: Hamilton v. Nakai, 453 F.2d 152 (9th Cir.1971),cert. denied, 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed.2d 332 (1972); United States v. Kabinto, 456 F.2d 1087 (9th Cir.1972); Sekaquaptewa v. MacDonald, 544 F.2d 396 (9th Cir.1976), cert. denied, 430 U.S. 931, 97 S.Ct. 1550, 51 L.Ed.2d 774 (1977); Sekaquaptewa v. MacDonald, 575 F.2d 239 (9th Cir.1978); Sekaquaptewa v. MacDonald, 626 F.2d 113 (9th Cir.1980); Sidney v. MacDonald, 536 F.Supp. 420 (D.Ariz.1982), aff'd, Sidney v. Zah, 718 F.2d 1453 (9th Cir.1983); Hopi Tribe v. Watt, 530 F.Supp. 1217 (D.Ariz.1982), aff'd 719 F.2d 314 (9th Cir.1983). See also Sekaquaptewa v. MacDonald, 448 F.Supp. 1183 (D.Ariz.1978); Sekaquaptewa v. MacDonald, 619 F.2d 801 (9th Cir.1980); and Sekaquaptewa v. MacDonald, 591 F.2d 1289 (9th Cir.1979) for cases involving the dispute between the tribes over lands on an adjoining Reservation.

(FN4.) The Relocation Act (25 U.S.C. § 640d-28) provides that eligible persons may apply for life estate leases, allowing them to remain on the reservation of the other tribe until one of two determinable events occur.

(FN5.) United States of America v. Komisaruk, 885 F.2d 490 (9th Cir.1989).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Jenny Manybeads, et al., Plaintiffs-Appellants,

v.

United States of America, et al., Defendants-Appellees

DC No. CV-88-0410-PCT-EHC

7/31/00

Before: PREGERSON, NOONAN, and THOMPSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Pregerson has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for rehearing en banc is REJECTED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Jenny Manybeads, Yellowwoman Yazzie; Ashkie Bitsi; Irene Yazzie; Blanche Wilson; Waldine Yazzie; Dan R. Yazzie; Bessie Begay; Mae Wilson Tso; Askie Tso; Earl Tso; Sam W. Tso; Betty A. Tso; Fiona Tso; Joe Benally; Biolet Ashkie; et al., Plaintiffs-Appellants,

v.

United States of America; Donald P. Hodel, in his official capacity as Secretary of the Interior; United States Department of the Interior; United States Bureau of Indian Affairs, et al., Defendants-Appellees

DC No. CV-88-0410-PCT-EH

5/10/91

Before: PREGERSON, NOONAN and THOMPSON, Circuit Judges.

This case was argued in San Francisco, California on April 10, 1991. In its consideration of this case, the panel believes that the best interests of the parties would be served if the case were settled. The panel is also of the view that with the assistance of an experienced settlement mediator, there is a reasonable possibility that a settlement, satisfactory to the parties, can be achieved. Accordingly, it is ordered that within ten days from the date of the filing of this order, the parties, through their respective counsel, contact the Honorable Harry R. McCue, United States Magistrate, Southern District of California, United States Courthouse, 940 Front Street, San Diego, California 92189, telephone (619) 557-5585, and establish the time and place for an initial settlement conference. The initial settlement conference shall be held within thirty (30) days from the date of the filing of this order, subject to such extensions as the Magistrate may authorize. Settlement negotiations shall be concluded within ninety (90) days from the date of the filing of this order. If the case has not been settled within these time constraints, an opinion or memorandum disposition deciding the case will be issued.

The panel has considered the complicated nature of this case and the issues presented. It recognizes that settlement cannot be achieved without constructive participation by the parties. It is confident, however, that if settlement discussions are undertaken in good faith with realistic recognition by all parties that reasonable accommodations must be made,

settlement can be achieved and that settlement will serve the best interests of the parties.

The Navajo Nation and the Hopi Tribe, although not parties to this litigation, have filed *amici curiae* briefs and have a significant interest in the outcome of this case. Accordingly, they and their counsel are invited and urged to participate in the settlement proceedings hereby ordered.

Submission of this case is withdrawn pending further order of this court.

MOTION FILED

DEC 28 2000

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(2)

No. 00-886

IN THE

Supreme Court of the United States

JENNY MANYBEADS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE HOPI TRIBE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to S. Ct. R. 37.2(b), the Hopi Tribe ("the Tribe") respectfully moves for leave to file an *amicus curiae* brief in opposition to the petition for a writ of certiorari in *Manybeads v. United States*. In accordance with S. Ct. R. 37.2(b), this motion is submitted as one document with the brief sought to be filed.

PARTIES WHO HAVE WITHHELD CONSENT

Petitioners, Jenny Manybeads *et al.*, have withheld their consent. Respondents, the United States of America *et al.*, have granted consent to the filing of this brief.

NATURE OF THE MOVANT'S INTEREST

The Tribe is vitally interested in the outcome of this litigation. The relief sought by the Plaintiffs, if granted, would jeopardize the Tribe's rights to the land granted it by the Navajo-Hopi Land Settlement Act of 1974 and its rights under the Accommodation Agreements which have already been ratified by Congress and signed by Navajo families residing on the Hopi Partitioned Lands ("HPL"). This suit threatens to disrupt and delay the implementation of a final, decades-old judicial decree that partitioned disputed lands and the concomitant relocation of Navajos from Hopi lands.

The Tribe has a legally protected interest in the land at issue here, which constitutes an approximately 1.8 million-acre area in northeastern Arizona that has been the subject of several acts of Congress and over forty years of litigation. *See, e.g., Clinton v. Babbitt*, 180 F.3d 1081, 1083-85 & n.2 (9th Cir. 1999) (summarizing the dispute and providing a partial listing of the resulting Ninth Circuit opinions). The dispute dates back to an 1882 Executive Order, *see Healing v. Jones*, 210 F. Supp. 125, 129 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963), and has continued to the present day. The *Healing* decision granted the Tribe exclusive use of a portion

of the 1882 Reservation, and the Tribe and the Navajo Nation ("the Nation") joint undivided interests in the remaining area of approximately 1.8 million acres (the "Joint Use Area"). *See id.* at 191-92. When joint use proved a failure, Congress, in the Navajo-Hopi Land Settlement Act of 1974, Pub. L. No. 93-531, 88 Stat. 1712 (codified as amended at 25 U.S.C. §§ 640d to 640d-31 (1994)), provided for the eventual partition of the Joint Use Area, granting half of the land to the Nation, and relocation of members of one tribe residing on land partitioned to the other. *See Sekaquaptewa v. MacDonald*, 626 F.2d 113, 119 (9th Cir. 1980) (affirming the partition).

Following partition, all Hopis residing on Navajo Partitioned Lands, and most Navajos residing on the HPL, relocated, receiving benefits from a statutorily-created commission. *See* 25 U.S.C. §§ 640d-11 to –14 (establishing the relocation commission and providing for relocation benefits). A small group of Navajos, including Petitioners, remains on the HPL. Petitioners initiated this lawsuit in 1988, claiming that the 1974 Act's partition and relocation provisions violate their constitutional rights, and seeking to remain indefinitely on the HPL. The district court dismissed Petitioners' suit on the merits, *see Manybeads v. United States*, 730 F. Supp. 1515 (D. Ariz. 1989), and Petitioners appealed the dismissal of their free exercise and equal protection claims. Pursuant to an order of the Ninth Circuit Court of Appeals, from 1991 to 1996, the Tribe participated in negotiations with Petitioners, the United States, and others, resulting in a Settlement Agreement and Accommodation Agreement ratified by Congress in 1996. These Agreements settle various claims by the Tribe against the government for its failures to protect the Tribe's interests in the HPL, while permitting HPL Navajos to remain on the HPL pursuant to 75-year leases.

The Tribe has a legally-protected interest both in regaining exclusive use of the HPL and in resolution of the long-standing Navajo-Hopi land dispute. This litigation, in which Petitioners claim an unrestricted interest in extensive portions of the HPL, threatens the Tribe's core sovereignty interests in use and control of its own lands, as well as threatening a settlement arrived at through decades of congressionally- and judicially-mandated negotiation and compromise.

REASONS FOR GRANTING THE MOTION

An opportunity for the Hopi Tribe to be heard in support of its interests is essential for just resolution of the matter. Two of Petitioners' three questions presented represent assaults on the sovereign immunity of the Tribe: a claim that as a matter of law the Tribe lacks such immunity as to prospective and declaratory relief, and a claim that the Tribe has waived such immunity. Because the United States has changed its position to oppose the Tribe's indispensability claim, if the Tribe is not allowed to participate as an *amicus curiae*, no one will present arguments defending the Tribe's core interest in its own sovereignty. Indeed, it is quite possible that none of the parties will present arguments in support of the decision of the Ninth Circuit. In essence, the Tribe's vital interests would be decided in a suit between two parties both advancing views adverse to those interests.

Of even greater importance is the subject matter of this litigation. At the core of this lawsuit is a claim by Navajo residents for permanent and effectively unlimited dominion over Hopi lands. The Hopi Tribe's attempt to regain control of the precise lands in question has been at the core of decades of litigation and legislation. *See Clinton*, 180 F.3d at 1089 ("The Hopi tribe . . . has a legally protected interest in regaining jurisdiction over the Hopi Partitioned Lands." (citations omitted)). Indeed, the court of appeals below recognized that the Hopi Tribe is not merely necessary but

indispensable to resolution of the instant litigation. Now, however, both plaintiffs and the United States assert that the Tribe need not be heard in this litigation. Indeed, plaintiffs have withheld their consent that the Tribe participate as an *amicus curiae*. Presumably, they would present the Tribe with an impossible choice: either to be without a voice in this litigation over its vital interests, or else to intervene in the litigation at the potential cost of waiver of its sovereign immunity. "It is wholly at odds with the policy of tribal immunity to put the tribe to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986).

It would be unjust to deprive the Tribe of the opportunity to be heard in support of its interest in regaining jurisdiction and control over the HPL and the sanctity of its sovereign immunity. The Tribe therefore respectfully moves for leave to file an *amicus curiae* brief before the Court's consideration of the petition for a writ of certiorari in this case.

Respectfully submitted,

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Amicus curiae the Hopi Tribe ("the Tribe")[1] respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit's opinion in this case, *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000) ("*Manybeads II*").

STATUTES INVOLVED

Although the Court of Appeals affirmed the dismissal of Petitioners' suit based on Fed. R. Civ. P. 19, this case involves two federal statutes: the Navajo-Hopi Land Settlement Act of 1974, Pub. L. 93-531, 88 Stat. 1712 (codified as amended at 25 U.S.C. §§ 640d to 640d-31) ("the 1974 Settlement Act"); and the Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. 104-301, 110 Stat. 3649 (as amended by Pub. L. 105-256, § 3, 112 Stat. 1897 (1998)) ("the 1996 Settlement Act"). The pertinent text of these statutes is set forth in the Appendix attached hereto, p. 1a, *infra*.

STATEMENT OF THE CASE

Congress enacted the 1974 Settlement Act to resolve the long-standing dispute between the Tribe and the Navajo Nation ("the Nation") concerning a 1.8 million-acre tract in northeast Arizona known as the Joint Use Area. Congress provided in that act for an eventual court partition of the Joint Use Area, and, in 1979, the United States District Court for the District of Arizona partitioned approximately 900,000 acres known as the Hopi Partitioned Lands ("HPL") to the Tribe, and approximately 900,000 acres known as the Navajo Partitioned Lands ("NPL") to the Nation. *See Sekaquaptewa v. MacDonald*, 626 F.2d 113, 119 (9th Cir. 1980) (affirming the partition).

Under the 1974 Settlement Act, members of each tribe were required to move from the lands partitioned to the other tribe. All of the few Hopis residing on the NPL voluntarily relocated, and thousands of Navajos residing on the HPL (the "HPL Navajos") also moved. In 1988, some of the remaining HPL

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1. Counsel for the Tribe are the sole authors of this brief and no person or entity other than the Tribe made a financial contribution to the preparation and submission of this brief.

Navajos filed suit against the United States, claiming that the relocation provisions of the 1974 Settlement Act were unconstitutional. *See Manybeads v. United States*, 730 F. Supp. 1515 (D. Ariz. 1988) ("*Manybeads I*"). In support of its motion to dismiss, the United States argued that the Tribe was a necessary and indispensable party to this lawsuit under Fed. R. Civ. P. 19. *See* Memorandum of the United States in Support of Its Motion to Dismiss at 39, *Manybeads I* (No. CIV 88-410). The district court dismissed the lawsuit on its merits, *see Manybeads I*, 730 F. Supp. at 1522, but on appeal the United States Ninth Circuit Court of Appeals ordered the parties to enter into mediation. This resulted in two agreements: the "Accommodation Agreement" and the "Settlement Agreement."

The Accommodation Agreement permits certain HPL Navajos to enter into a 75-year lease term with the Tribe. Pursuant to the Accommodation Agreement, the HPL Navajos are assured a three-acre homesite, up to ten acres of farmland, and the right to continue using the land for the traditional (including religious) uses they were then making of the HPL. An overwhelming majority of HPL Navajos have signed Accommodation Agreements; those choosing not to sign must relocate pursuant to the 1974 Settlement Act.

Pursuant to the Settlement Agreement, the Tribe agreed to dismiss several claims against the United States and abide by the terms of the Accommodation Agreement. In return for the Settlement Agreement, the United States agreed to provide the Tribe a compensation package totaling $50.2 million, and including up to 500,000 acres of land.

Congress ratified both the Accommodation and Settlement Agreements in the 1996 Settlement Act. *See* S. Rep. No. 104-363 at 1 (1996). Pursuant to the Settlement Agreement, the Tribe has dismissed its claims against the United States.

The 1974 Settlement Act and these agreements conferred legal rights and benefits on the Tribe, which would be adversely affected if relocation were declared unconstitutional. In particular, if the Plaintiffs obtain the relief they seek

(1) the Navajos who have refused to sign Accommodation Agreements would assert a right to remain on Hopi land—despite Congress's promise in both the 1974 and 1996 Settlement Acts that the Hopi Tribe, through relocation, would recover the ownership, use and possession of its land, and (2) the Navajos who have signed Accommodation Agreements would claim they need not abide by them. The Tribe's legal rights to the HPL and its rights under the agreements would thus be jeopardized, and the years of negotiations that began with the Ninth Circuit's 1991 order and led to the Settlement and Accommodation Agreements ratified by Congress in 1996 would have been for naught.

Following ratification of the 1996 Settlement Act, Petitioners' appeal proceeded with the court of appeals requesting supplemental briefing on the issue of whether the Tribe is an indispensable party to this lawsuit. The United States, reversing its prior position, argued that the Tribe is not a necessary party "because, although the Tribe has legally protected interests at stake, in this case the United States adequately represents the interests of the absent Tribe." Supplemental Brief of the Federal Appellants on the Indispensable Party Issue at 4, *Manybeads II* (No. 90-15003).

The court of appeals affirmed the district court's dismissal of Petitioners' suit on the ground that the Tribe was a necessary and indispensable party who could not be joined due to its sovereign immunity. *See Manybeads II*, 209 F.3d at 1166-67. The Ninth Circuit found that the Tribe's joinder was necessary pursuant to Rule 19(a)(1), which provides that a party is necessary if in its absence "complete relief cannot be accorded among those already parties," holding that "Manybeads cannot be afforded complete relief without undoing the Accommodation Agreement . . . and without undoing the Settlement Agreement," *Manybeads II*, 209 F.3d at 1166. It further found the Tribe's joinder necessary pursuant to Rule 19(a)(2) because the Tribe " 'claims an interest relating to the subject of the action and is so situated that the disposition of the action may [i] as a practical matter impair or impede' its

ability to protect that interest," *Manybeads*, 209 F.3d at 1166 (quoting Fed. R. Civ. P. 19(a)(2)(i)). The court of appeals then applied the indispensability analysis of Fed. R. Civ. P. 19(b), and, concluding that equitable factors favored dismissal, affirmed the judgment of the district court. *See id.* at 1166-67.

OBJECTIONS TO THE PETITION TO GRANT THE WRIT

I. The United States Court of Appeals for the Ninth Circuit was not presented with the argument that tribal sovereign immunity should not extend to suits for declaratory or injunctive relief. Nor can the implicit decision by the Ninth Circuit not to abrogate tribal sovereign immunity in such a fashion reasonably be construed as in conflict with decisions of the Fifth, Eighth, Tenth, or Eleventh Circuit Courts of Appeals.

The petition for a writ of certiorari should be denied because it seeks review of an issue not presented by Petitioners below nor addressed by the Court of Appeals, and implicates no legitimate conflict between United States Courts of Appeals.

As an initial matter, the Tribe objects to Petitioners' assertion that the Court of Appeals "failed to address the issue of the Tribe's sovereign immunity as it relates to the nature of Petitioners' claims and the relief requested." Petition for Writ of Certiorari at 11. The Ninth Circuit's failure to address the issue is a direct result of the Petitioners' failure to request the court to abrogate tribal sovereign immunity in actions for prospective and declaratory relief. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (citations omitted). Considering this Court's recent reaffirmation in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), that the limits of tribal sovereign immunity are for Congress to modify, this case presents no exceptional reason for departure from the Court's ordinary rule.

Nevertheless, the Tribe would like to take this opportunity to dispel any potential misperception that there exists a conflict among the United States Courts of Appeals on the question of the

applicability of tribal sovereign immunity to suits for injunctive or declaratory relief. First, since the Ninth Circuit in this case did not address the question, its silence on the matter cannot reasonably be seen as in conflict with the decision of another circuit. Second, even assuming *arguendo* that the *Manybeads II* opinion can be read as an implicit decision not to abrogate tribal sovereign immunity, such a decision is fully consistent with the decisions of this Court as well as the United States Courts of Appeals for the Eighth, Tenth, and Eleventh Circuits. Third, most of the cases cited by Petitioner address the extent of Congress's abrogation of tribal sovereign immunity under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 (1994) ("IGRA"), and as such have no bearing on the scope of that immunity absent such abrogation. Fourth and finally, although a cursory reading of the opinion in *TTEA v. Ysleta del sur Pueblo*, 181 F.3d 676 (5th Cir. 1999), might appear to create a conflict, the Fifth Circuit's opinion is more reasonably read to endorse the well-established proposition that it is only tribal *officers*, not tribes themselves, who fail to enjoy the protection of tribal sovereign immunity in suits for declaratory or injunctive relief. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

The decision below is fully consistent with *Santa Clara Pueblo* — a suit "seeking declaratory and injunctive relief," 436 U.S. at 51 — wherein this Court held that "an officer of the Pueblo . . . is not protected by the tribe's immunity from suit," *id.* at 59 (citing *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 171-72 (1977); *Ex Parte Young*, 209 U.S. 123 (1908)). The United States Courts of Appeals have consistently followed *Santa Clara Pueblo* and held that where Congress has not abrogated tribal sovereign immunity, that immunity protects tribes, but leaves their officers open to suit under a tribal analogy to the doctrine of *Ex Parte Young*.[2]

2. *See, e.g., Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) (holding that "suits for prospective injunctive relief are permissible against tribal officers under the *Ex Parte Young* framework" (citations omitted)); *Florida v. Seminole*

(Cont'd)

In this case, however, the interests of the tribe itself are at stake, and not the acts of any of its officers. *Cf. Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997) (rejecting application of *Ex Parte Young* doctrine because "the declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe").

Petitioners cite to several cases interpreting the extent to which Congress has abrogated tribal sovereign immunity against suits for declaratory and injunctive relief under IGRA.[3]

(Cont'd)

Tribe of Florida, 181 F.3d 1237, 1244 (11th Cir. 1999) ("In *Santa Clara Pueblo*, 436 U.S. at 58-59, decided well before *Oklahoma Tax Commission* [*v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991)], the Court unequivocally upheld a tribe's immunity from a suit that sought only declaratory and prospective injunctive relief."); *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1262-64 (10th Cir. 1998) (holding that tribal sovereign immunity bars a suit "seeking a declaratory judgment" with regard to certain tribal water rights (citing *Santa Clara Pueblo*, 436 U.S. 49)); *United States v. Finn*, 919 F. Supp. 1305, 1340-41 (D. Minn. 1995).

3. *See Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997); *Calvello v. Yankton Sioux Tribe*, 899 F. Supp. 431, 438 (D.S.D. 1995) (holding that "*Ross* [*v. Flandreau Santee Sioux Tribe*, 809 F.Supp. 738 (D.S.D. 1992)], *Rita, Inc.* [*v. Flandreau Santee Sioux Tribe*, 798 F. Supp. 586 (D.S.D. 1992)], and *Maxam* [*v. Lower Sioux Indian Community of Minnesota*, 829 F. Supp. 277 (D. Minn. 1993)] stand at most for the proposition that federal courts may find a waiver of tribal sovereign immunity *for the purpose of enforcing the provisions of the IGRA* where prospective injunctive relief, and not monetary relief, is sought" (emphasis added)); *Calvello v. Yankton Sioux Tribe*, 584 N.W.2d 108, 114 n.4 (S.D. 1998); *see also Smith v. Babbitt*, 875 F. Supp. 1353, 1361 & n.4 (D. Minn. 1995); *Davids v. Coyhis*, 869 F. Supp. 1401, 1406-07 & n.9 (E.D. Wis. 1994). Insofar as *Maxam*, 829 F. Supp. at 281-82, might be read to endorse abrogation outside the IGRA context, this suggestion has been rejected by district courts within the Eighth Circuit in *Calvello*, 899 F. Supp. at 438, and *Smith*, 875 F. Supp. at 1361, as well as implicitly by this Court's subsequent decision in *Kiowa Tribe*.

The Tribe respectfully submits that the extent to which Congress has abrogated or tribes have waived sovereign immunity under IGRA is wholly irrelevant to the decision of the Court of Appeals for the Ninth Circuit in this case. The court of appeals implicitly assumed, consistent with *Santa Clara Pueblo*, that the inherent sovereign immunity of tribes themselves is not limited to actions for damages. Its decision cannot be in conflict with the IGRA cases cited by Petitioners because it simply did not involve the question of the extent of IGRA's abrogation of tribal immunity, but rather the inherent limits of that immunity absent Congressional action.

The Tribe recognizes that dicta from the Fifth Circuit's decision in *TTEA*, 181 F.3d at 680-81, might potentially be read as stating that tribal sovereign immunity does not apply to claims seeking declaratory and injunctive relief. Careful examination of *TTEA*, however, reveals that the Fifth Circuit's opinion contains no actual holding that conflicts with the decisions of other Circuits to permit suits for declaratory and injunctive relief only against tribal officers and not against tribes in their sovereign capacity. This is so for three reasons.

First, any discussion of immunity in *TTEA* constitutes *obiter dicta* in light of the Ninth Circuit's ultimate conclusion that "the federal district court correctly concluded that it had no juri diction to entertain TTEA's action on the contract against the Tribe." *TTEA*, 181 F.3d at 685. *TTEA* involved a suit by a Texas corporation, naming both the Ysleta Del Sur Pueblo and several of its officers, seeking injunctive and declaratory relief. *See id.* at 680. It is true that after citing *Santa Clara Pueblo*, *Ex Parte Young*, *Seminole Tribe*, and Justice Stevens's concurrence in *Oklahoma Tax Commission*, the Fifth Circuit stated that "while the district court correctly dismissed the damages claim based on sovereign immunity, tribal immunity did not support its order dismissing the actions seeking declaratory and injunctive relief." *Id.* at 680-81. After making this statement, however, the court went on to affirm the district court's dismissal of the action against the Tribe for lack of

jurisdiction. *See id.* at 681-83. The Fifth Circuit's discussion of immunity is therefore *dicta*.

Second, careful reading of the court's language leaves considerable ambiguity as to whether it intended to abrogate the sovereign immunity of the tribe itself, as opposed to that of its officials:

> Though the defendants in *Puyallup* were not tribal officials, the Court cited it the next Term in finding a tribal governor not immune from a suit seeking declaratory and injunctive relief against enforcement of a tribal ordinance. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). Years later, Justice Stevens suggested that tribal sovereign immunity might not extend "to claims for prospective equitable relief against a tribe." *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505, 515 (1991) (Stevens, J., concurring).
>
> The distinction between a suit for damages and one for declaratory or injunctive relief is eminently sensible, and nothing in *Kiowa* undermines the relevant logic. State sovereign immunity does not preclude declaratory or injunctive relief against state officials. *See Ex Parte Young*, 209 U.S. 123 (1908). There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state sovereign immunity. *Cf. Seminole Tribe v. Florida*, 517 U.S. 44 (1996). In any event, *Santa Clara Pueblo* controls.

TTEA, 181 F.3d at 680-81. On the one hand, the *TTEA* court's citation of Justice Stevens' concurrence in *Oklahoma Tax Commission* and its general statement that "tribal immunity did not support [the district court's] order dismissing the actions seeking declaratory and injunctive relief," *id.* at 681, could be read to suggest the court sought to abrogate the immunity of

the tribe itself. On the other hand, the court's citation of *Santa Clara Pueblo*, which found sovereign immunity to bar declaratory and injunctive relief against a tribe but permit them against a tribal governor; its discussion of *Ex Parte Young* relief against *state officials*; and its statement that "*Santa Clara Pueblo* controls," more sensibly support the proposition that the court was indicating that, although dismissal of claims for relief against the tribe itself was proper, the district court should not have dismissed the actions seeking declaratory and injunctive relief *against the tribal officials*. Indeed, this is precisely how the United States District Court for the Eastern District of Texas has interpreted *TTEA*: "[R]ecent Fifth Circuit authority permits jurisdiction over individual members of the Tribal Council without the tribe's presence. Implicit within that holding is that tribal immunity does not automatically result in dismissal of the entire action." *Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas*, 78 F. Supp. 2d 589, 602-03 (E.D. Tex. 1999) (citing *TTEA*, 181 F.3d 676).

Finally, interpreting *TTEA* as abrogating tribal immunity would put it at odds with a recent decision of this Court. In *Kiowa Tribe*, 523 U.S. at 758-60, this Court, although questioning the historical basis and justifiability as a matter of policy of tribal sovereign immunity, acknowledged that the doctrine persists as defined by the Court, and that reductions in its scope, if any, are to be made by Congress. Thus, the doctrine of tribal immunity stands unless and until it is abrogated by Congress or waived by the tribe in question. *See id.* Having rejected the invitation to impose judicially-created limits on tribal immunity in *Kiowa Tribe*, the Court is now presented with another request for judicial abrogation of tribal sovereign immunity. In *Kiowa Tribe*, however, this Court recognized that Congress knows how to "alter [the] limits" of tribal sovereign immunity "through explicit legislation." *Id.* at 759 (citing *Santa Clara Pueblo*, 436 U.S. at 58). The Tribe submits that *Santa Clara Pueblo* and *Kiowa Tribe* make federal law on this point amply clear, and that this case presents no reason for the Court to revisit its decision to leave abrogation of tribal sovereign immunity to Congress.

II. The Ninth Circuit's application of Federal Rule of Civil Procedure 19 has not decided an unsettled and important question of federal law, nor does its decision conflict with a relevant decision of this Court.

The decision whether to dismiss for failure to join an indispensable party under Fed. R. Civ. P. 19 requires two inquiries. First, the court determines whether the absent party is necessary. *See* Fed. R. Civ. P. 19(a). If a party is necessary but cannot be made a party, the court then proceeds to the four-part "equity and good conscience" inquiry of Fed. R. Civ. P. 19(b).

Here, Petitioners meld the inquiries under Fed. R. Civ. P. 19 as to necessity and indispensability[4] to argue that this case should go forward without the Tribe because the United States is an adequate representative of the Tribe's interests. The court of appeals disagreed, holding (1) that the Tribe is a necessary party; (2) that the United States is not an adequate representative so as to render the Tribe's joinder unnecessary; and (3) that the case must be dismissed because the Tribe is indispensable. This holding, which is based on the particular facts and laws involved in this case, is in conflict with no relevant decision of this Court.

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4. Petitioners imply that the question of whether the United States can adequately represent the interests of the Tribe is relevant to the determination pursuant to Fed. R. Civ. P. 19(b) as to "whether in equity and good conscience the action should proceed . . . or should be dismissed." Adequacy of representation, however, is relevant primarily to the question of whether a party's interests are adequately protected under Rule 19(a)(2)(i), and hence whether that party is necessary to the litigation. *See Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1496-97 (D.C. Cir. 1997); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *but see Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986). Regardless, however, of which subsection of Rule 19 is implicated, the Ninth Circuit's finding of inadequate representation is in conflict with no relevant decision of this Court.

a. The decision of the Ninth Circuit that the Tribe is a necessary party to this litigation conflicts with no relevant decision of this Court.

In its opinion below, the Ninth Circuit held that the Tribe is a necessary party, *see Manybeads II*, 209 F.3d at 1166, because it "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest," Fed. R. Civ. P. 19(a).[5] Petitioners seem to be raising questions about this holding on two grounds. First they imply that the Tribe does not have an interest relating to the subject of the action when they assert that "Petitioners do not seek . . . a declaration that the Tribe is not the beneficial owner of the HPL." Petition for Writ of Certiorari at 19 n.42. This misstates the record. The district court specifically found that Petitioners seek "the right for themselves and their heirs in perpetuity, to reside on the Hopi Reservation on what they consider their extensive customary use areas, with unlimited grazing privileges, the right to construct such buildings

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5. In *Clinton v. Babbitt*, 180 F.3d 1081, 1089 (9th Cir. 1999), the court, conducting a Rule 19(a) analysis in a separate case involving constitutional challenges by HPL Navajos to the terms of the Accommodation Agreement, held that

> Any relief accorded the plaintiffs will "as a practical matter impair or impede" the Tribe's ability to protect [its legally protected] interest in the HPL. *See* S. Rep. 104-363, at 34 (additional views of Sen. Pete Domenici) ("The Accommodation Agreement . . . is an integral and critical component of any settlement. Without the Accommodation Agreement, the Navajos on Hopi land would remain out of compliance and the threat of pending litigation could easily lead to more bitterness and distrust, more litigation and no resolution of this long-standing problem.").

If Petitioners prevail in this litigation, it is probable that HPL Navajos having signed Accommodation Agreements will refuse to comply with the terms of those Agreements, and further conflict will ensue, to the great detriment of both the Tribe and HPL Navajos.

as they wish, and to utilize unlimited water claimed necessary to their needs." *Manybeads I*, 730 F. Supp. at 1516. The Tribe submits that such a declaration threatens to render the Tribe's ostensible beneficial ownership of the HPL a nullity. There can be no doubt that the Tribe "claims an interest relating to the subject" of this action. *See Clinton*, 180 F.3d at 1089. That subject is, of course, control over land, water, and grazing rights with the HPL.

Second, Petitioners raise the issue as to when the United States can be an adequate representative of an absent Indian tribe. Adequate representation by a party to the litigation can, under some, circumstances, ensure that an absent person's ability to protect his interest is not impaired within the meaning of Rule 19(a)(2)(i). *See Makah Indian Tribe*, 910 F.2d at 558. Under certain circumstances the authorized participation of the United States in litigation on behalf of an Indian tribe can adequately prevent impairment of that tribe's ability to protect its interest. *See, e.g., Heckman v. United States*, 224 U.S. 413, 444-45 (1912). The Ninth Circuit's conclusion, however, that the particular facts and laws implicated in this case preclude such adequate representation under the "practical" test of Rule 19(a)(2)(i), is in conflict with no relevant decision of this Court.[6] As a practical matter, should Petitioners obtain a judgment adverse to the United States in the Tribe's absence, the Tribe, as a non-party, would have no right to appeal that judgment should the United States, for whatever reason, elect not to pursue its own appeal. *See Cherokee Nation*, 117 F.3d at 1497.

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6. Even assuming *arguendo* that the United States could ensure that the Tribe's ability to protect interest was not impeded in this action, the Tribe would still be a necessary party pursuant to Fed. R. Civ. P. 19(a)(1), which provides for joinder if "in the person's absence complete relief cannot be accorded among those already parties." The Ninth Circuit specifically found that "the Hopi Tribe qualifies as a necessary party under both parts of Rule 19(a)." *Manybeads II*, 209 F.3d at 1166. Petitioners fail to identify any decision of this Court that allegedly conflicts with the court of appeals' application of Rule 19(a)(1) to the facts of this case.

Nor can the Tribe be required to intervene at the cost of waiving its sovereign immunity. *See Wichita*, 788 F.2d at 775. The Court of Appeals properly found that the existence of an express statutory conflict of interest between the United States' trust duties to the Tribe and its duties to protect the rights and interests of HPL Navajos prevents adequate representation by the United States and creates a practical possibility that the Tribe's interest may be impaired or impeded. *See* Fed. R. Civ. P. 19(a)(2)(i).

Petitioners argue that the Ninth Circuit's holding that the United States may not adequately safeguard the Tribe's interest is in conflict with this Court's decisions in *Nevada v. United States*, 463 U.S. 110 (1983), and *Arizona v. California*, 460 U.S. 605 (1983). The holdings in those cases, however, are not relevant to the Ninth Circuit's decision in this case, for several reasons. *Nevada* and *Arizona* were both large-scale water rights adjudications, wherein the United States, pursuant to the doctrine of *Winters v. United States*, 207 U.S. 564 (1908), asserted, on behalf of one (in *Nevada*) or more (in *Arizona*) Indian tribes, water rights that the government had reserved for their reservations. *See Nevada*, 463 U.S. at 116; *Arizona*, 460 U.S. at 609-10. Neither case addressed whether Indian tribes were necessary parties under Rule 19, but rather examined whether tribes could relitigate the final adjudication of reserved water rights already asserted on their behalf by the United States. The Navajo-Hopi land dispute, however, presents very different relationships among the government, the tribes, and individual Indians.

The relevant inquiry in *Nevada* and *Arizona* was whether the government was legally authorized, for res judicata purposes, to represent the interests of an Indian tribe or tribes in water rights adjudication so as to preclude relitigation by the tribe or tribes of their reserved water rights. *See Nevada*, 463 U.S. at 134-35; *Arizona*, 460 U.S. at 626-27.[7] This case presents a

7. *Nevada*, 463 U.S. at 143-44, and *Arizona*, 460 U.S. at 625-26, both emphasized the special need for certainty and finality in determination of water rights. Here, by contrast, it is Petitioners who (Cont'd)

completely different question: Whether, when the United States is *not* authorized to assert the rights of Indian tribes in an intertribal dispute *and* bears specific statutory duties to a party adverse to a tribe, it can nevertheless, by participating in litigation in that tribe's absence, adequately safeguard the tribe's interests for purposes of Rule 19(a)(2)(i). Indeed, in *Arizona*, 460 U.S. at 613-15 & n.5, the Court specifically rejected the States' argument that "the presence of the United States insures adequate representation of the Tribes' interests" for purposes of the standards for permissive intervention under the Federal Rules of Civil Procedure. Therefore, statements in *Nevada* and *Arizona* concerning adequacy of government representation of tribes in the res judicata context do not dictate whether such representation is adequate for the distinct purposes of the joinder and intervention provisions of the Federal Rules of Civil Procedure.

Unlike the potential conflict of interest between the government's general trust duties to Indians and its broad role in pursuing reclamation, as discussed in *Nevada*, 463 U.S. at 127-28, this case involves a specific statutory command that the government advocate on behalf of the interests of HPL Navajos within the context of the Hopi-Navajo land dispute. *See* 25 U.S.C. § 640d-9(c) ("The Secretary shall take such action as may be necessary in order to assure the protection, until relocation, of the rights and property of individuals subject to relocation under" the 1974 Settlement Act and concomitant partition); *see also Hopi Tribe v. Watt*, 530 F. Supp. 1217 (D. Ariz. 1982), *aff'd*, 719 F.2d 314 (9th Cir. 1983). The principle that a tribe cannot relitigate water rights previously asserted on its behalf by the United States does not necessarily imply that the United States can substitute itself for the Tribe in an intertribal dispute when faced with statutorily-mandated duties

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are attempting, despite Congress's attempt to bring about a final resolution of this land dispute in the 1974 and 1996 Settlement Acts, to relitigate land claims already finally resolved by the courts.

to protect the very rights to the HPL asserted by the individual HPL Navajos.

Petitioners point to no court decision where the federal government, faced with conflicting trust obligations to *multiple Indian tribes*, has been deemed an adequate representative of one tribe or another in an intertribal dispute. Nor has *Nevada* ever been cited for the proposition that the government is an adequate representative of an Indian tribe, for Rule 19(a) purposes, in a dispute between different tribes or individual Indians and an Indian tribe. Although the United States in *Arizona* asserted water rights on behalf of multiple Indian tribes, that decision implicated no actual or potential *intertribal* conflicts. Here, the Secretary of the Interior must not merely "carry water on two shoulders," *Nevada*, 463 U.S. at 128, but must represent the specific interests of HPL Navajos in this very dispute.[8] In *Nevada*, by contrast, the government asserted water rights on behalf of a single tribe as against non-Indian claimants; it did not seek to represent conflicting tribal interests in an intertribal dispute.

Moreover, unlike its role in water rights adjudication, the United States is not authorized to assert the Tribe's rights in and to HPL lands. *Cf. Arizona*, 460 U.S. at 626-27. The 1974 Act provided an explicit program for adjudication of the rights of the Tribe and the Nation to the lands in dispute. Nowhere does it authorize the government to represent either or both the parties. Indeed, the statute is quite explicit in authorizing "[e]ither tribe, acting through the chairman of its tribal council for and on behalf of the tribe," to commence or defend actions against each other. 25 U.S.C. § 640d-17(a); *see also* 25 U.S.C.

8. *Cf. Wichita*, 788 F.2d at 775 ("Moreover, whatever allegiance the government owes the tribes as trustee, is necessarily split among the three competing tribes involved in this case. This case, therefore, falls squarely under the rule that when 'there is a conflict between the interests of the United States and the interests of Indians, representation of the Indians by the United States is not adequate.' " (quoting *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977)) (further citations omitted)).

§§ 640d-1 to -5, -7. The government is simply not an adequate representative of the Tribe in this dispute; the very need for the enactment of the 1974 Act arose out of the failure of the government, over the course of many years, to protect the Tribe's interest in lands set aside for its use.

The Tribe has already made generous concessions to the HPL Navajos in exchange for its dismissal of its own claims against the Government. While in other contexts the Government has authorization and duty to assert the water rights of Indian tribes, under Rule 19(a)(2)(i) the inquiry is whether, "as a practical matter," representation by the government *may* impair or impede the Tribe's ability to protect its interests. Because the statutory scheme mandated for resolution of disputes over the HPL land imposes on the government a specific duty to protect the interests of the individual Petitioners in connection with this dispute, such impairment is very much a practical possibility. If this litigation is allowed to continue without the Tribe, the Tribe faces the possibility that the government, in order to settle Petitioners' claims, may press the Tribe to make even deeper concessions or may simply stop litigating. In light of the government's long history of compromising Hopi interests in the HPL, such can hardly be deemed adequate representation of the Tribe's interests.

b. The decision of the Ninth Circuit that the Tribe's sovereign immunity requires dismissal under Rule 19(b) conflicts with no decision of this Court.

The Ninth Circuit's application of the four-factor indispensability test set forth in Rule 19(b) conflicts with no relevant decision of this Court.[9] In assessing these factors,

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9. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or

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federal courts have generally found that "when an indispensable party is immune from suit, there is very little room for balancing of other factors, because immunity may be viewed as one of those interests compelling by themselves." *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542, 548 (2d Cir. 1991) (citations and internal quotations omitted).[10] The Ninth Circuit, in effect, so held here. *See Manybeads*, 209 F.3d at 1166 (holding that Manybeads's free exercise claim "cannot be asserted when a sovereign, not a party to the case, will suffer substantially from its vindication").

The fact that dismissal of this suit will leave Petitioners without an equitable remedy in federal court implicates only application of the well-established doctrine of sovereign immunity and the standards of Rule 19(b). In the first place, this factor does not outweigh the potential prejudice to the Tribe,[11] the inadequacy of any judgment entered in its absence,

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> avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). The Court of Appeals found that only the fourth factor favors Petitioners. *See Manybeads II*, 209 F.3d at 1166.

10. *See, e.g., Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991) ("Some courts have noted, however, that when the necessary party is immune from suit, there is very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor."); *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989); *Wichita*, 788 F.2d at 777 n.13; *but cf. Davis v. United States*, 192 F.3d 951 (10th Cir. 1999) (holding that the sovereign immunity of an absent party does not wholly obviate the balancing of other factors); *Clinton*, 180 F.3d at 1089-91 (balancing Rule 19(b) factors despite the sovereign immunity of an absent party).

11. For the reasons set forth at pages 12-16, *supra*, the presence of the United States does not adequately mitigate the potential prejudice to the Tribe.

and the impossibility of shaping relief to avoid these problems. In the second place, Congress has elected, through the 1974 and 1996 Settlement Acts, to create a specific dispute-resolution mechanism for addressing the long and painful conflict between the Hopi and Navajo peoples over the use of the land at issue in this case. In that legislation, while providing for the protection of the HPL Navajos by the Secretary, Congress mandated that actions arising in respect of the partition are to be brought and defended *only* by the Tribes and their respective Chairmen on behalf of all tribal members. *See* 25 U.S.C. §§ 640d-7(a), (c); 640d-17(a), (c). Congress saw fit to abrogate the immunity of Tribe and Nation only with respect to proceedings between the sovereigns themselves, and not to suits by members of one against the other in its sovereign capacity. Thus, although dismissal of this lawsuit for inability to join the Tribe will leave Petitioners without an avenue for equitable relief in federal court, it is the very nature of sovereign immunity to leave some alleged wrongs without a remedy save for those remedies permitted by the sovereign. *See Santa Clara Pueblo*, 436 U.S. at 58. In the context of this case, it is clear that Congress's detailed remedial scheme under the 1974 Act precludes Petitioners' desired relief.

III. The United States Court of Appeals for the Ninth Circuit did not rule on the question of whether the Tribe waived its sovereign immunity in this litigation either expressly or by estoppel. Additionally, Petitioners' waiver argument implicates neither an important and unsettled question of federal law nor the questions accepted for certiorari review in *C&L Enterprises, Inc. v. Citizen Potawatomi Nation*, No. 00-292.

Petitioners did not present this argument in their briefs to the court of appeals, and thus that court did not rule on the question. Moreover, to the extent that Petitioners presented their argument below by making reference to the Hopi Tribe's participation in negotiation and settlement proceedings, this issue implicates only the application of an established rule of law to particular facts. That rule is the well-settled one

that "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59 (citations and internal quotations omitted). The application of that well-established rule to the facts of this case does not justify review on a writ of certiorari.

First, it is readily apparent from the plain language of the Settlement Agreement that Section 10 of the Agreement pertains solely to enforcement of the provisions of the Agreement itself: "The United States and the Tribe hereby agree that the provisions of this Settlement Agreement shall be enforceable in either the United States Court of Federal Claims in Washington, D.C., or in the United States District Court in Phoenix, Arizona, as appropriate." S. Rep. 104-363 at 46. It simply defies reason to read this provision as representing an unequivocal waiver of immunity in a suit that seeks to enforce no provision of the Settlement Agreement—a suit that, to the contrary, seeks to dismantle the legal and practical foundations of that Agreement.

Second, Petitioners' implication that the Tribe's conduct in agreeing to what they repeatedly characterize as a "win-win" agreement for them somehow estops the Tribe from asserting sovereign immunity is groundless. First, such an implication flies in the face of the proposition that waivers of sovereign immunity must be explicit. Second, in allowing the plaintiffs the opportunity to both sign an agreement and pursue their appeal, the Tribe merely elected not to require plaintiffs to dismiss their appeal as a condition for entering into an Accommodation Agreement. Such a decision cannot reasonably be read as an unequivocal expression of intent to waive a legitimate sovereign immunity defense to that appeal.

Finally, the waiver question allegedly presented by this case has nothing in common with the question presented in No. 00-292, *C&L Enterprises, Inc. v. Citizen Potawatomi Nation*. In that case, this Court accepted for review two questions: one regarding the enforceability of an arbitration agreement contained in a contract executed by an Indian tribe for commercial construction outside of reservation or trust land

boundaries, and a second asking whether execution of such an arbitration agreement constitutes a waiver of sovereign immunity from a state court suit against the Indian tribe to enforce an arbitration award resulting from such arbitration proceedings. *See* Petition for Writ of Certiorari at i, *C&L Enterprises, Inc. v. Citizen Potawatomi Nation*, *cert. granted*, 121 S. Ct. 377 (Oct. 30, 2000) (No. 00-292).

The questions implicated in *C&L Enterprises* bear no connection to the question of whether the 1996 Settlement Agreement expresses an unequivocal waiver of tribal sovereign immunity with respect to suits other than those seeking to enforce that Agreement. In this case, there can be no credible claim that Petitioners are seeking to enforce any provision of the Settlement Agreement. *C&L Enterprises* is therefore wholly immaterial to the question of the Tribe's immunity as it bears on the Rule 19 issue in the instant lawsuit.

CONCLUSION

This matter involves application of well-established rules of law interpreting Fed. R. Civ. P. 19 to the particular facts of the *Manybeads* litigation. The Ninth Circuit's application of law to fact conflicts neither with another court of appeals nor with a relevant decision of this Court. *Amicus curiae* the Hopi Tribe respectfully prays that the Petition for a Writ of Certiorari be DENIED.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTES AND ACT

25 U.S.C. § 640d-7(a) to (d)

§ 640d-7. Determination of tribal rights and interests in land

(a) Authorization to commence and defend actions in District Court

Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe, is each hereby authorized to commence or defend in the District Court an action against the other tribe and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934, except the reservation established by the Executive Order of December 16, 1882, for the purpose of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes.

(b) Allocation of land to respective reservations upon determination of interests

Lands, if any, in which the Navajo Tribe or Navajo individuals are determined by the District Court to have the exclusive interest shall continue to be a part of the Navajo Reservation. Lands, if any, in which the Hopi Tribe, including any Hopi village or clan thereof, or Hopi individuals are determined by the District Court to have the exclusive interest shall thereafter be a reservation for the Hopi Tribe. Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity and the area so partitioned

shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively.

(c) Actions for accounting, fair value of grazing, and claims for damages to land; determination of recovery; defenses

(1) Either as a part of or in a proceeding supplementary to the action authorized in subsection (a) of this section, either tribe, through the chairman of its tribal council for and on behalf of the tribe, including all villages, clans, and individual members thereof, may prosecute or defend an action for the types of relief, including interest, specified in section 640d-17 of this title, including all subsections thereof, against the other tribe, through its tribal chairman in a like representative capacity, and against the United States as to the types of recovery specified in subsection (a)(3) of section 640d-17 of this title and subject to the same provisions as contained in said subsection, such action to apply to the lands in issue in the reservation established by the Act of June 14, 1934 (48 Stat. 960).

(2) In the event the Hopi Tribe or Navajo Tribe is determined to have any interest in the lands in issue, the right of either tribe to recover hereunder shall be based upon that percentage of the total sums collected, use made, waste committed, and other amounts of recovery, which is equal to the percentage of lands in issue in which either tribe is determined to have such interest.

(3) Neither laches nor the statute of limitations shall constitute a defense to such proceedings if they are either

prosecuted as a part of the action authorized by this section or in a proceeding supplemental thereto, if instituted not later than twenty-four months following a final order of partition and exhaustion of appeals in an action filed pursuant to this section.

(d) Denial of Congressional interest in merits of conflicting claims; liability of United States

Nothing in this section shall be deemed to be a Congressional determination of the merits of the conflicting claims to the lands that are subject to adjudication pursuant to this section, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

* * *

25 U.S.C. § 640d-7(a) to (e)

§ 640d-9. Partitioned or other designated lands

(a) Lands to be held in trust for Navajo Tribe; exception

Subject to the provisions of sections 640d-8 and 640d-16(a) of this title, any lands partitioned to the Navajo Tribe pursuant to sections 640d-2 and 640d-3 of this title and the lands described in the Act of June 14, 1934 (48 Stat. 960), except the lands as described in section 640d-7 of this title, shall be held in trust by the United States exclusively for the Navajo Tribe and as a part of the Navajo Reservation.

Appendix

(b) Lands to be held in trust for Hopi Tribe

Subject to the provisions of sections 640d-8 and 640d-16(a) of this title, any lands partitioned to the Hopi Tribe pursuant to sections 640d-2 and 640d-3 of this title and the lands as described in section 640d-7 of this title shall be held in trust by the United States exclusively for the Hopi Tribe and as a part of the Hopi Reservation.

(c) Protection of rights and property of individuals subject to relocation

The Secretary shall take such action as may be necessary in order to assure the protection, until relocation, of the rights and property of individuals subject to relocation pursuant to this subchapter, or any judgment of partition pursuant thereto, including any individual authorized to reside on land covered by a life estate conferred pursuant to section 640d-28 of this title.

(d) Protection of benefits and services of individuals subject to relocation

With respect to any individual subject to relocation, the Secretary shall take such action as may be necessary to assure that such individuals are not deprived of benefits or services by reason of their status as an individual subject to relocation.

Appendix

(e) Tribal jurisdiction over partitioned lands

(1)[1] Lands partitioned pursuant to this subchapter, whether or not the partition order is subject to appeal, shall be subject to the jurisdiction of the tribe to whom partitioned and the laws of such tribe shall apply to such partitioned lands under the following schedule:

(A) Effective ninety days after July 8, 1980, all conservation practices, including grazing control and range restoration activities, shall be coordinated and executed with the concurrence of the tribe to whom the particular lands in question have been partitioned, and all such grazing and range restoration matters on the Navajo Reservation lands shall be administered by the Bureau of Indian Affairs Navajo Area Office and on the Hopi Reservation lands by the Bureau of Indian Affairs Phoenix Area Office, under applicable laws and regulations.

(B) Notwithstanding any provision of law to the contrary, each tribe shall have such jurisdiction and authority over any lands partitioned to it and all persons located thereon, not in conflict with the laws and regulations referred to in paragraph (A) above, to the same extent as is applicable to those other portions of its reservation. Such jurisdiction and authority over partitioned lands shall become effective April 18, 1981.

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1. So in original. Subsec. (e) enacted without a par. (2).

The provisions of this subsection shall be subject to the responsibility of the Secretary to protect the rights and property of life tenants and persons awaiting relocation as provided in subsections (c) and (d) of this section.

* * *

25 U.S.C. § 640d-17

§ 640d-17. Actions for accounting, fair value of grazing, and claims for damages to land

(a) Authorization to commence and defend actions in District Court

Either tribe, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof, is hereby authorized to commence or defend in the District Court an action or actions against the other tribe for the following purposes if such action or actions are not settled pursuant to section 640d-2 or 640d-3 of this title:

> **(1)** for an accounting of all sums collected by either tribe since the 17th day of September 1957 as trader license fees or commissions, lease proceeds, or other similar charges for the doing of business or the use of lands within the joint use area, and judgment for one-half of all sums so collected, and not paid to the other tribe, together with interest at the rate of 6 per centum per annum compounded annually;

(2) for the determination and recovery of the fair value of the grazing and agricultural use by either tribe and its individual members since the 28th day of September 1962 of the undivided one-half interest of the other tribe in the lands within the joint use area, together with interest at the rate of 6 per centum per annum compounded annually, notwithstanding the fact that the tribes are tenants in common of such lands; and

(3) for the adjudication of any claims that either tribe may have against the other for damages to the lands to which title was quieted as aforesaid by the United States District Court for the District of Arizona in such tribes, share and share alike, subject to the trust title of the United States, without interest, notwithstanding the fact that such tribes are tenants in common of such lands: Provided, That the United States may be joined as a party to such an action and, in such case, the provisions of sections 1346(a)(2) and 1505 of Title 28 shall not be applicable to such action.

(b) Defenses

Neither laches nor the statute of limitations shall constitute a defense to any action authorized by this subchapter for existing claims if commenced within two years from December 22, 1974, or one hundred and eighty days from the date of issuance of an order of the District Court pursuant to section 640d-2 or 640d-3 of this title, whichever is later.

(c) Further original, ancillary or supplementary actions to insure quiet enjoyment

Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of the tribes by the tribes and the members thereof, and to fully accomplish all objects and purposes of this subchapter. Such actions may be commenced in the District Court by either tribe against the other, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof.

(d) United States as party; judgments as claims against the United States

Except as provided in clause (3) of subsection (a) of this section, the United States shall not be an indispensable party to any action or actions commenced pursuant to this section. Any judgment or judgments by the District Court in such action or actions shall not be regarded as a claim or claims against the United States.

(e) Remedies

All applicable provisional and final remedies and special proceedings provided for by the Federal Rules of Civil Procedure and all other remedies and processes available for the enforcement and collection of judgments in the district courts of the United States may be used in the enforcement

and collection of judgments obtained pursuant to the provisions of this subchapter.

* * *

Navajo-Hopi Land Dispute Settlement Act of 1996
§§ 1-4, 7, 11

Navajo-Hopi Land Dispute Settlement Act of 1996

Pub.L. 104-301, Oct. 11, 1996, 110 Stat. 3649, as amended Pub.L. 105- 256, § 3, Oct. 14, 1998, 112 Stat. 1897, provided that:

"Section 1. Short title.

"This Act [amending sections 415 and 640d-24 of this title and enacting this note] may be cited as the 'Navajo-Hopi Land Dispute Settlement Act of 1996'.

"Sec. 2. Findings.

"The Congress finds that —

> **"(1)** it is in the public interest for the Tribe, Navajos residing on the Hopi Partitioned Lands, and the United States to reach a peaceful resolution of the longstanding disagreements between the parties under the Act commonly known as the 'Navajo-Hopi Land Settlement Act of 1974' (Public Law 93-531; 25 U.S.C. 640d et seq.) [this subchapter].

"**(2)** it is in the best interest of the Tribe and the United States that there be a fair and final settlement of certain issues remaining in connection with the Navajo-Hopi Land Settlement Act of 1974 [this subchapter], including the full and final settlement of the multiple claims that the Tribe has against the United States;

"**(3)** this Act [amending sections 415 and 640d-24 of this title and enacting this note], together with the Settlement Agreement executed on December 14, 1995, and the Accommodation Agreement (as incorporated by the Settlement Agreement), provide the authority for the Tribe to enter agreements with eligible Navajo families in order for those families to remain residents of the Hopi Partitioned Lands for a period of 75 years, subject to the terms and conditions of the Accommodation Agreement;

"**(4)** the United States acknowledges and respects —

> "**(A)** the sincerity of the traditional beliefs of the members of the Tribe and the Navajo families residing on the Hopi Partitioned Lands; and
>
> "**(B)** the importance that the respective traditional beliefs of the members of the Tribe and Navajo families have with respect to the culture

and way of life of those members and families;

"**(5)** this Act, the Settlement Agreement, and the Accommodation Agreement provide for the mutual respect and protection of the traditional religious beliefs and practices of the Tribe and the Navajo families residing on the Hopi Partitioned Lands;

"**(6)** the Tribe is encouraged to work with the Navajo families residing on the Hopi Partitioned Lands to address their concerns regarding the establishment of family or individual burial plots for deceased family members who have resided on the Hopi Partitioned Lands; and

"**(7)** neither the Navajo Nation nor the Navajo families residing upon Hopi Partitioned Lands were parties to or signers of the Settlement Agreement between the United States and the Hopi Tribe.

"**Sec. 3. Definitions.**

"Except as otherwise provided in this Act [amending sections 415 and 640d-24 of this title and enacting this note], for purposes of this Act, the following definitions shall apply:

"**(1) Accommodation.** — The term 'Accommodation' has the meaning provided that term under the Settlement Agreement.

"**(2) Hopi partitioned lands.** — The term 'Hopi Partitioned Lands' means lands located in the Hopi Partitioned Area, as defined in section 168.1(g) of title 25, Code of Federal Regulations (as in effect on the date of enactment of this Act) [Oct. 11, 1996].

"**(3) Navajo partitioned lands.** — The term 'Navajo Partitioned Lands' has the meaning provided that term in the proposed regulations issued on November 1, 1995, at 60 Fed.Reg. 55506.

"**(4) New lands.** — The term 'New Lands' has the meaning provided that term in section 700.701(b) of title 25, Code of Federal Regulations.

"**(5) Secretary.** — The term 'Secretary' means the Secretary of the Interior.

"**(6) Settlement agreement.** — The term 'Settlement Agreement' means the agreement between the United States and the Hopi Tribe executed on December 14, 1995.

"**(7) Tribe.** — The term 'Tribe' means the Hopi Tribe.

"**(8) Newly acquired trust lands.** — The term 'newly acquired trust lands' means lands taken into trust for the Tribe within the State of

Arizona pursuant to this Act [amending sections 415 and 640d-24 of this title and enacting this note] or the Settlement Agreement.

"Sec. 4. Ratification of settlement agreement.

"The United States approves, ratifies, and confirms the Settlement Agreement.

"Sec. 7. Action to quiet possession.

"If the United States fails to discharge the obligations specified in section 9(c) of the Settlement Agreement with respect to voluntary relocation of Navajos residing on Hopi Partitioned Lands, or section 9(d) of the Settlement Agreement, relating to the implementation of sections 700.137 through 700.139 of title 25, Code of Federal Regulations, on the New Lands, including failure for reason of insufficient funds made available by appropriations or otherwise, the Tribe may bring an action to quiet possession that relates to the use of the Hopi Partitioned Lands after February 1, 2000, by a Navajo family that is eligible for an accommodation, but fails to enter into an accommodation.

"Sec. 11. Effect of this Act on cases involving The Navajo Nation and The Hopi Tribe.

"Nothing in this Act [amending sections 415 and 640d-24 of this title and enacting this note] or the amendments made by this Act shall be interpreted or deemed to preclude, limit, or endorse, in any manner, actions by the Navajo Nation that seek, in court, an offset from judgments for payments received by the Hopi Tribe under the Settlement Agreement.

Supreme Court, U.S.
FILED
MAR 2 2001

No. 00-886

In the Supreme Court of the United States

JENNY MANYBEADS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

This case was brought in 1988 by certain members of the Navajo Nation who refused to relocate from lands partitioned in favor of the Hopi Tribe pursuant to the Navajo-Hopi Land Settlement Act of 1974, Pub. L. No. 93-531, 88 Stat. 1712. The district court dismissed the action for failure to state a claim. Pursuant to mediation ordered by the court of appeals, many of the initial plaintiffs elected to participate in a settlement and accommodation plan approved by Congress, Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. No. 104-301, 110 Stat. 3649, and signed an agreement allowing them to remain on the land under a 75-year lease term. The court of appeals subsequently affirmed the dismissal of the action. The question presented is as follows:

Whether the court of appeals properly upheld the dismissal of this litigation.

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In the Supreme Court of the United States

No. 00-886

JENNY MANYBEADS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 209 F.3d 1164. The opinion of the district court (Pet. App. 5a-15a) is reported at 730 F. Supp. 1515.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2000. A petition for rehearing was denied on July 31, 2000 (Pet. App. 16a). On October 20, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 28, 2000, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For more than a century, the Hopi Tribe and Navajo Nation have laid competing claims to the ownership and use of approximately 1.9 million acres of land in northern Arizona. In 1958, Congress authorized litigation between the Tribes to quiet title to that land. Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403. Pursuant to that litigation, a federal district court determined that 650,000 acres of the disputed area belonged exclusively to the Hopi Tribe, and that the two Tribes shared joint and undivided interests in the remaining 1.8 million acres. The latter area is known as the "Joint Use Area." See *Clinton* v. *Babbitt*, 180 F.3d 1081, 1083-1084 (9th Cir. 1999).

In 1974, Congress passed the Navajo-Hopi Land Settlement Act, Pub. L. No. 93-531, 88 Stat. 1712 (1974 Settlement Act), which directed the courts to partition the Joint Use Area. 25 U.S.C. 640d. Under the 1974 Settlement Act, any lands partitioned to either Tribe pursuant to the Act shall be held in trust by the United States exclusively for the Tribe (*i.e.*, Navajo Nation or Hopi Tribe) to which the lands are partitioned. 25 U.S.C. 640d-9(a) and (b). The Act requires each of the Tribe's members to relocate from land partitioned to the other Tribe. 25 U.S.C. 640d-13, 640d-14. The Act also provides that "reasonable provision shall be made for the use of and right of access to identified religious shrines * * * where such use and access are for religious purposes." 25 U.S.C. 640d-5(c); see 25 U.S.C. 640d-20 (directing Secretary of Interior to make same provision for religious shrines).

The 1974 Settlement Act abrogates the sovereign immunity of the Tribes with respect to specified actions instituted by one Tribe against the other Tribe, 25 U.S.C. 640d-17(a), as well as such further actions "as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of the tribes by the tribes and the members thereof, and to fully accomplish all objects and purposes of [the 1974 Settlement Act]," 25 U.S.C. 640d-17(c). There is no comparable abrogation of sovereign immunity for suits by members of one Tribe against the other Tribe.

2. Petitioners are members of the Navajo Nation who have refused to relocate from Hopi partitioned lands pursuant to the terms of the 1974 Settlement Act. In 1988, they filed suit against the United States, the Secretary of the Department of the Interior, the Assistant Secretary of the Department of the Interior, the United States Bureau of Indian Affairs, the Navajo and Hopi Indian Relocation Commission (a small federal agency, now named the Office of Navajo and Hopi Indian Relocation, 25 U.S.C. 640d-11), and the Chairman of the Commission. Petitioners contend, *inter alia*, that, because they use the land for religious practices, the relocation provisions of the 1974 Settlement Act violate their free exercise rights under the First Amendment. They also claim that they have been denied equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment, because in other instances Congress has allowed "white settlers" to remain on land. Pet. App. 10a. They seek declaratory and injunctive relief. *Id.* at 5a-6a.

3. The United States moved to dismiss the action. In addition to arguing that petitioners failed to state a claim upon which relief could be granted, the United States argued that petitioners are not proper parties to

assert the claims (because the claims belonged to the Navajo Nation); that the claims were barred by the doctrines of res judicata, collateral estoppel, and laches, and by the statute of limitations; and that the Hopi Tribe and Navajo Nation are indispensable parties and may not be joined because of their sovereign immunity. See U.S. Mem. in Support of Mot. to Dismiss 39-43. The United States did not address whether it could adequately represent the interests of the Hopi Tribe, but noted that "the United States' interests and the interests of the Hopi Tribe are not necessarily coextensive." *Id.* at 39.[1]

The district court agreed with the United States that petitioners had failed to state a claim, and granted the motion to dismiss. Pet. App. 7a-15a. The court held that petitioners' free exercise claim lacked merit under the framework established by *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). As the court explained, "[n]either the [1974 Settlement Act] nor court cases construing the Act prohibit the free exercise of religion by any of the plaintiffs," and, indeed, the Act called for religious uses

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[1] The United States argued that, under the 1974 Settlement Act, "the Navajo Tribal Chairman is the only proper party who can assert the claims that plaintiffs assert here." U.S. Mem. in Support of Mot. to Dismiss 42 (relying on 25 U.S.C. 640d-17(c)); see *Sekaquaptewa* v. *MacDonald*, 591 F.2d 1289, 1292 (9th Cir. 1979) ("Finally, § 640d-17(c) provides that individual interests may be litigated in a suit between the two tribes only when those interests are represented by the tribal chairmen."). Subsequent filings by petitioners, and by the Navajo Nation as amicus curiae, made clear, however, that petitioners were asserting only constitutional arguments concerning their *individual* rights, and that petitioners were not seeking to relitigate already-decided issues concerning ownership of the Hopi partitioned lands.

to be taken into account in dividing the Joint Use Area. Pet. App. 8a-9a (citing 25 U.S.C. 640d-5(c) and 640d-20). The court also rejected petitioners' equal protection claim, finding the argument to be "disingenuous here where the joint property owners were two Indian Tribes." *Id.* at 10a. Because the court dismissed for failure to state a claim, it did not reach the issue whether the Hopi Tribe is an indispensable party under Rule 19 of the Federal Rules of Civil Procedure.

4. After briefing and oral argument, the court of appeals concluded that "the best interests of the parties would be served if the case were settled." Pet. App. 17a. As a result, the court deferred resolution of the appeal and ordered the parties to participate in settlement negotiations under the direction of a magistrate judge. The court also "invited and urged" the Navajo Nation and Hopi Tribe—which are not parties in this case but which had filed amicus briefs—to participate in the settlement proceedings. *Id.* at 18a. The mediation eventually resulted in two agreements: an "Accommodation Agreement" between the Hopi Tribe and individual members of the Navajo Nation residing on lands partitioned for the Hopi Tribe; and a "Settlement Agreement" between the Hopi Tribe and the United States.

The Accommodation Agreement allows certain Navajo residents of the Hopi partitioned lands (HPL)—the lands at issue in this case—to enter into a 75-year lease with the Hopi Tribe. Pursuant to the Accommodation Agreement, eligible HPL Navajos are assured a three-acre homesite, up to ten acres of farmland, and the right to continue traditional uses (includeing religious uses) they were then making of the HPL. An overwhelming majority of HPL Navajos, including

many of the plaintiffs in this action, signed an Accommodation Agreement.

Under the Settlement Agreement, the Hopi Tribe agreed to dismiss several claims against the United States and to abide by the terms of the Accommodation Agreement. The United States, in turn, agreed to provide $50.2 million to the Tribe, and to take into trust for the Tribe up to 500,000 acres of land acquired by the Tribe. The Settlement Agreement further provided that by February 1, 2000, the Office of Navajo and Hopi Indian Relocation would complete implementation of its regulations relating to relocation for any Navajo family eligible for an Accommodation Agreement who did not enter into an Accommodation Agreement. The Settlement Agreement further provided that if the United States failed to discharge that obligation, the Hopi Tribe preserved any action regarding quiet possession against the United States arising out of the use of the HPL after February 1, 2000, by any Navajo family eligible for but not a party to an Accommodation Agreement.

Congress ratified both the Accommodation Agreement and the Settlement Agreement in the Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. No. 104-301, 110 Stat. 3649, amended in part, Act of Oct. 14, 1998, Pub. L. No. 105-256, § 3, 112 Stat. 1897 (1996 Settlement Act). See S. Rep. No. 363, 104th Cong., 2d Sess. 1 (1996). Neither the Accommodation Agreement nor the Settlement Agreement required petitioners to dismiss their appeal in this case.

5. Following the 1996 Settlement Act, the appeal in this case proceeded. The court of appeals requested supplemental briefing on whether the Hopi Tribe—which declined to waive its tribal sovereign immunity from suit and participate in this litigation as a party—is

a necessary and indispensable party in this case pursuant to Rule 19 of the Federal Rules of Civil Procedure, such that the case must be dismissed due to the Tribe's absence.

The United States argued that the Hopi Tribe is not a necessary party under Rule 19(a), because the United States is capable of adequately representing the Tribe's interests, and that the court did not have to consider whether the Tribe is an indispensable party under Rule 19(b). Gov't Supp. C.A. Br. on Indispensable Party Issue 5, 16.[2] The United States further argued that, even though the Tribe's absence did not require a dismissal pursuant to Rule 19, the case should be dismissed for failure to state a claim. *Id.* at 5. See also Gov't Supp. C.A. Br. on Merits. The court of appeals held that the Hopi Tribe is a necessary and indispensable party pursuant to Rule 19, and affirmed the dismissal on that ground. Pet. App. 2a-4a.

The court first concluded that the Hopi Tribe is a necessary party under Rule 19(a)(1), reasoning that petitioners "cannot be afforded complete relief without undoing the Accommodation Agreement * * * and without undoing the Settlement Agreement by which the Hopi Tribe is entitled to compensation for what is conceded to the Navajos." Pet. App. 2a. Likewise, the court concluded that the Tribe is a necessary party under Rule 19(a)(2), because the Tribe "'claims an interest relating to the subject of the action and is so

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[2] As the United States pointed out in its supplemental brief on the indispensable party issue (at 3 n.1), in the district court the United States had taken the position that, due to the Hopi Tribe's interest as the beneficial owner of the land at issue in this case, the Tribe was an indispensable party. "The [United States's] memorandum in the district court did not discuss the ability of the United States to adequately represent the Hopi Tribe." *Ibid.*

situated that the disposition of the action may * * * as a practical matter impair or impede' its ability to protect that interest." *Id.* at 3a (quoting Rule 19(a)(2)(i)).

The court rejected the position of the United States and petitioners that the United States could adequately represent the interests of the Hopi Tribe. According to the court, the United States is not capable of adequately representing the interests of the Hopi Tribe because, under 25 U.S.C. 640d-9(c) and (d), the United States owes a trust responsibility to the individual Navajos subject to relocation. Pet. App. 3a. If the government "undertook to act for the Hopi Tribe," the court believed, the United States "would stand on both sides of the question." *Ibid.*

The court further concluded that the Hopi Tribe is an indispensable party under Rule 19(b). As the court explained, a judgment in favor of petitioners "would upset two agreements, long and carefully worked out, * * * to the substantial prejudice of the Hopi Tribe." Pet. App. 3a. While the court acknowledged that dismissing the case under Rule 19 would allow petitioner's First Amendment claim to go unaddressed, it concluded that this fact did not, in itself, compel a contrary result. *Ibid.*

6. The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing en banc. Pet. App. 16a.

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals, and the "unique facts of this case" (Pet. 23) make it a poor candidate for certiorari. Furthermore, dismissal of the case is in any event proper because petitioners' claim on the merits fails under *Lyng* v.

Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988). Further review is not warranted.

1. The only question presented by the petition that was actually decided by the court of appeals below is whether "the United States is capable of representing the absent Hopi Tribe in this case." Pet. 23; see Pet. i (question two). That issue does not merit this Court's review.

As discussed above, in the court of appeals, the United States argued that it is capable of adequately representing the interests of the Hopi Tribe in this litigation, and that the Tribe therefore is not a necessary party within Rule 19(a). While the court of appeals disagreed with that argument, we do not believe its decision merits review. The decision does not conflict with any decision of this Court or of any other court of appeals. In addition, while we disagree with the court's conclusion, the court sought to tailor its ruling to this case. First, the court stated that the government's contention that it could adequately represent the interests of the Hopi Tribe was "weak because it is the reverse of what the government contended in the district court." Pet. App. 3a. Second, the court stated that the government's contention was "contradicted" by the fact that, "[b]y the explicit terms of [the 1974 Settlement Act], the government must protect the property and personal rights of the individual Navajos subject to relocation." *Ibid.* Third, the court stated that it did not mean to "suggest that it is the United States' trust responsibility to the Navajo Nation that creates a conflict of interest preventing the United States from adequately representing the Hopi Tribe," but rather the court found that the conflict stemmed from the responsibility that the government

owes to "the very plaintiffs in this case," under the specific terms of the legislation at issue. *Id.* at 3a-4a.[3]

Petitioners erroneously suggest (Pet. 19-20) that the court of appeals' ruling conflicts with *Nevada* v. *United States*, 463 U.S. 110 (1983), and *Arizona* v. *California*, 460 U.S. 605 (1983). Those cases involved efforts to reopen certain water-rights litigation. In the course of holding that such efforts were foreclosed by prior litigation, this Court recognized that, "[a]s a fiduciary," the United States has the authority to bring certain water rights claims "for the Indians and [to] bind them in the litigation." *Arizona*, 460 U.S. at 626-627; see *Nevada*, 463 U.S. at 135. In *Arizona*, the Court further rejected the argument that the United States' representation of Tribes in the prior proceedings was inadequate, stating that there was "no demonstration" of any "actual conflict of interest" in that case, and that "[t]he United States often represents varied interests in litigation involving water rights, particularly given the large extent and variety of federal land holdings in the West." 460 U.S. at 627. Even if *Nevada* and *Arizona* could be extended beyond the specific water-rights context in which they arose, they do not conflict with the decision below. Neither *Nevada* nor *Arizona* considered whether, or under what circumstances, an Indian Tribe may be a necessary party for purposes of Rule 19(a).

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[3] As this Court has recognized, the decision whether to dismiss pursuant to Rule 19 is inherently case specific. See *Provident Bank* v. *Patterson*, 390 U.S. 102, 118-119 (1968) ("The decision whether to dismiss (*i.e.*, the decision whether the person missing is 'indispensable') must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests.").

Petitioners also argue that the decision below conflicts with the decisions of other Ninth Circuit panels. See Pet. 21-22 (citing *Southwest Ctr. for Biological Diversity* v. *Babbitt*, 150 F.3d 1152 (1998), and *Washington* v. *Daley*, 173 F.3d 1158 (1999)). We agree that there is some tension among those decisions. See Gov't C.A. Supp. Br. on Indispensable Party Issue 14-16. The court below, however, apparently believed that this case was distinguishable in view of the specific obligations owed by the United States to the individual plaintiffs under the 1974 Settlement Act and the other factors discussed above. See Pet. App. 3a-4a. In any event, any inconsistency that might exist among those decisions is for the Ninth Circuit, and not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

2. Petitioners ask (Pet. 11) this Court to decide "whether an Indian Tribe's sovereign immunity necessarily extends to actions which only seek prospective equitable relief." That issue, however, was not raised in or decided by the court of appeals below. And that fact provides a sufficient reason to deny certiorari on this issue. See *Powell* v. *Nevada*, 511 U.S. 79, 85 n.* (1994) ("Because the issue was not raised, argued, or decided below, we should not settle it here."); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").[4]

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[4] Petitioners argue (Pet. 11) that the circuits are divided on the question whether tribal sovereign immunity extends to such actions. As the Hopi Tribe has explained in its amicus brief urging that the petition be denied, the asserted conflict does not merit this Court's review. Hopi Br. 5-9. And, in any event, in view of the

Petitioners contend (Pet. 11-12) that, insofar as this case does present the question whether the Hopi Tribe is entitled to sovereign immunity, the case implicates the question presented in *C&L Enterprises, Inc.* v. *Citizen Potawatomi Nation*, cert. granted, No. 00-292 (Oct. 30, 2000). That contention is erroneous. *C&L Enterprises* presents the question whether, or under what circumstances, an Indian Tribe's agreement to arbitrate disputes arising out of a standard-form commercial contract, and to judicial enforcement of arbitration awards entered pursuant to such contract, waives the Tribe's sovereign immunity from suit in state court. See 00-292 Pet. at i. This case, however, does not involve the enforcement of any arbitration agreement or arbitration award. There is accordingly no reason for the Court to hold this case for the disposition in *C&L Enterprises*.

3. Petitioners contend (Pet. 23) that, in light of the "unique facts of this case," the Hopi Tribe should be deemed to have waived its sovereign immunity from suit. In particular, although petitioners acknowledge (Pet. 24) that a Tribe does not waive its sovereign immunity by "appearing in a lawsuit as amicus," they argue that the Hopi Tribe has gone "far beyond" the role of an amicus insofar as the Tribe "actively involved itself as a full participant in both the litigation and mediation process." That fact-bound contention lacks merit. As this Court has held, "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58-59 (1978) (internal quotation marks and citation omitted). The Tribe in this case has not unequivocally

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"unique facts of this case" (Pet. 23), this case would be an ill-suited vehicle to resolve any conflict.

waived its sovereign immunity from suit, by its words or actions. Cf. *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676-686 (1999) (rejecting constructive waiver argument). In any event, petitioners' constructive waiver argument was not raised or decided below and, therefore, does not warrant review.

Petitioners similarly assert (Pet. 25-26) that the Tribe should not be permitted to invoke its sovereign immunity from suit when doing so would leave petitioners with "no alternative forum to bring their constitutional claim." This Court, however, has not recognized such an exception to sovereign immunity. Moreover, the court of appeals specifically weighed that factor in deciding whether dismissal was warranted under Rule 19. Pet. App. 3a. In any event, the factual premise for petitioners' argument appears to be incorrect. It appears that any of the individual petitioners who are in fact subject to relocation pursuant to the 1974 Settlement Act may be able to assert their constitutional claims as a defense in any federal court proceeding seeking to evict them pursuant to the provisions of the Act. Cf. *Banner* v. *United States*, 44 Fed. Cl. 568, 575 (1999).[5]

4. As the district court concluded, dismissal is also warranted in this case on the merits. See Pet. App. 7a-9a. Petitioners' free exercise claim is that, because they use the Hopi partitioned land to practice their religion,

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[5] Petitioners who have signed an Accommodation Agreement are no longer required to relocate under the terms of the 1974 Settlement Act and may continue to live at their homesite on Hopi land for 75 years. As a result, they should not be permitted to press their claims in this action that the relocation requirement is unconstitutional.

they have the "right to remain in perpetuity on [the land]." *Id.* at 7a. As the district court held, that claim fails under *Lyng* v. *Northwest Indian Cemetery Protective Association*, *supra*. See Pet. App. 7a-9a. The claim also fails under *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). The 1974 Settlement Act is a neutral and generally applicable law to which the *Smith* standard applies, and petitioners' free exercise claim fails under that standard. See Gov't C.A. Supp. Br. on Merits 11-15. Moreover, as discussed above, petitioners' First Amendment claim is seriously undercut by the fact that the 1974 Act specifically directs that religious uses be taken into account to the extent practicable in dividing the land. The 1996 Settlement Act goes even further by giving petitioners a reasonable option to remain on the land. As the district court explained, petitioners' equal protection claim is similarly unavailing. Pet. App. 9a-10a.

Congress and the courts have long struggled to resolve the land dispute between the Navajo Nation and Hopi Tribe underlying this litigation. The 1974 Settlement Act, in conjunction with the 1996 Settlement Act, is a fair and practical solution to a century-old dispute for which there is no resolution that will please everyone. The settlement and accommodation plan growing out of and ratified by those Acts, including the relocation requirement that now applies only to the few Navajo members who have elected not to enter into an Accommodation Agreement that would allow them to remain on the land, is the least burdensome means of addressing the interests of both Tribes (and their individual members) who have laid claims to the land. Petitioners' challenge to that plan lacks merit, and this decades-old litigation should come to an end.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 2000

JENNY MANYBEADS, et al.
Petitioners,

v.

UNITED STATES OF AMERICAL, et al.
Respondents.

PETITIONERS' REPLY BRIEF

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REPLY TO NEW ISSUES RAISED IN RESPONDENTS' OPPOSITION BRIEF

Petitioners reply to two issues raised for the first time in the United State's Brief in Opposition. Petitioners, in their Petition for *Writ of Certiorari,* only addressed the issue upon which the Ninth Circuit Court of Appeals dismissed their case, Petitioners' failure, under Rule 19(b) of the Federal Rules of Civil Procedure, to join the Hopi Tribe which the Ninth Circuit deemed to be an indespensable party. The opinion of the Ninth Circuit did not address the merits of Petitioners' claim.

In its Brief in Opposition the United States, made arguments relating to the underlying merits of this case. These specific arguments are:

1) Dismissal of Petitioners' Free Exercise of Religion Claim, On The Merits, Is Required By This Court's Decision In *Lyng v. Northwest Indian Cemetery Protective Association.*[1]
2) Petitioners' Free Exercise Claim Also Fails Under This Court's Decision In *Employment Division, Department of Human Resources of Oregon v. Smith.*[2]

I. The Decision in *Lyng v. Northwest Indian Cemetery Protection Association* Does Not Alter The Traditional First Amendment Analysis And Does Not Warrant Dismissal of Petitioners' Claims On The Merits

The District Court dismissed Petitioners' First Amendment claim, relying on this Court's decision in *Lyng.*[3] However, the factual circumstances of the instant case and *Lyng* are totally different making the rationale of Lyng inapplicable. In *Lyng* this Court determined there was no First Amendment violation because it was only the "incidental effects of government programs" that were found to impact on the *Lyng* claimants

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[1] 485 U.S. 439, 108 S.Ct. 1319 (1988).
[2] 494 U.S. 872, 110 S.Ct. 1595 (1990).
[3] *Manybeads v. U.S.*, 730 F.Supp. 1515 (D.Ariz. 1989).

religion. However, the *Lyng* majority made unmistakably clear that the traditional Free Exercise analysis of *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526 (1972) and *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963) was still operative:

> It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment. Thus, for example, ineligibility for unemployment benefits, based solely on a refusal to violate the Sabbath, has been analogized to a fine imposed on Sabbath worship. . . . . .

Lyng 485 U.S. at 450, 108 S.Ct. at 1326 (citing *Sherbert*).

Lyng holds that "incidental effects of government programs, which may make it more difficult to practice certain religions **but which have no tendency to coerce individuals to act contrary to their religious beliefs, [do not] require the government to bring forward a compelling justification for its otherwise lawful actions."** *Lyng, Id.*. (emphasis added) .

Lyng involved an unusual factual situation completely unlike the one at hand. The Indian claimants in *Lyng* were attempting to challenge a government construction program on unoccupied non-reservation land under the jurisdiction of the U.S. Forest Service. The Indian tribes involved had no claim of past or present occupancy. In sharp contrast, the Petitioners have legally occupied the land at issue, conducting religious ceremonies and burying their loved ones there, for hundreds of years.

In *Lyng* the Indians' claim that the construction program burdened the exercise of their religion was based on the "indirect effects" of Forest Service programs conducted on unoccupied Forest Service land. Tribal members merely contended that the construction of a road would make some of their religious practices "more difficult".

In contrast, this case involves an Act of Congress[4] that requires Petitioners to act in violation of their religion and affirmatively abandon their sacred land which is the cornerstone of traditional Navajo religion. The forced removal of the Petitioners from their religious homeland will

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[4] Navajo-Hopi Land Settlement Act of 1974, Pub.L.No.93-531, 88 Stat. 1712.

result in the total prohibition of future religious practices. Moreover, the challenged governmental actions here include, *inter alia*; the forced eviction of Petitioners from their homes; the seizure of Petitioners' livestock; a ban on construction prohibiting the construction of decent and safe homes, as well as religious structures, roads, sanitation, health and school facilities; and the complete denial of federal services and benefits to those who refuse, for religious reasons, to be relocated.

These government actions do not merely have an "incidental effect," they directly penalize Petitioners and serve to coerce them into acting contrary to their religious beliefs by denying them adequate food, housing, and the infrasturcture necessary to remain on their ancestral land. These affirmative acts of the federal Defendants combine to force Petitioners to either abandon or seriously alter their ceremonial practices which constitute the core of the free exercise of their religion.

It is this critical distinction which separates the instant case from *Lyng* and other free exercise cases such as *Bowen v. Roy*, 476 U.S. 693, 106 S.Ct. 2147 (1986), which involved only the "incidental effects" of government programs rather than coercive governmental actions which unequivocally penalize the exercise of religion. Neither *Lyng* or *Bowen* involved Acts of Congress that effectively compel persons to violate their religion.

This Court in *Lyng* could hardly have made this distinction more clearly than when it stated:

> In both cases [*Lyng* and *Bowen*], the challenged government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their religious beliefs. **In neither case however, would the affected individuals be coerced by the government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.** (emphasis added).

Lyng at 485 U.S. at 449, 108 S.Ct. at 1325.

In *Lyng* this Court referenced its decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), to illustrate the distinction between government

actions which merely impact on religion and those which affirmatively and directly coerce a person to act contrary to their religious beliefs. The distinction constitutes the difference between constitutional and unconstitutional governmental conduct.

> . . . [T]here is nothing whatsoever in the *Yoder* opinion to support the proposition that the "impact" on Amish religion would have been constitutionally problematic if the statute at issue had not been **coercive** in nature. (emphasis added).

485 U.S. at 457, 108 S.Ct. at 1329.

Moreover, the majority opinion by Justice O'Connor unequivocally states that had the *Lyng* case involved a statute, such as exists in this case, which prohibited the Indians from acting in accordance with their religion or was coercive in nature, the constitutional consequences would have been different.

> The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, **a law forbidding the Indian respondents' from visiting the Chimney Rock area would raise a different set of constitutional questions.**

485 U.S. at 453, 108 S.Ct. at 1327.

Finally, the government's actions in this case which violate the First Amendment and its trust obligations to Petitioners are not "otherwise lawful actions" as required in *Lyng, Id.*

This Court also emphasized in *Lyng* that the government had, in juxtaposition to the instant situation, done everything possible, short of abandoning the project, to accommodate the Indians' religious needs: "Except for abandoning its project entirely . . ., it is difficult to see how the government could have been more solicitous." 485 U.S. at 454. 108 S.Ct. at 1328.

In the instant case the federal Defendants have made no meaningful effort to accommodate Petitioners' religious needs. It is clear from the evidence presented below that merely offering Petitioners "access" to their former land for religious purposes is meaningless when the Navajos will be relocated hundreds of miles away from those sacred

areas.[5] This fact is of critical importance to Petitioners because as the *Lyng* Court recognized, accommodation is required to comply with "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian. . . including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rights." *Lyng Id.* (quoting the American Indian Religious Freedom Act, 42 U.S.C. 1996).

II. The Decision in *Employment Division v. Smith* is Not Controlling in This Case.

Smith decided a First Amendment claim brought by members of the Native American Church who were fired from their jobs for using peyote. They were denied unemployment benefits because they were deemed to have been justly fired for engaging in misconduct. The Indians challenged the denial of unemployment benefits on free exercise grounds as they used peyote as a religious sacrament. 110 S.Ct. at 1597-1598.

This Court ruled that the Oregon state statute at issue need not be subjected to the compelling interest test of *Sherbert, supra.*, and *Yoder, supra.*, because any burden on the complainants' religion. was not the result of direct governmental action directed at religious practices but merely the indirect effects of a neutral law. "[W]e would not apply it [compelling interest test] to require exemptions from a generally applicable criminal law." 110 S.Ct at 1603.[6]

This Court concluded that the statute in *Smith* did not place a burden on religion because it involved only the "incidental effects of a

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[5] Accommodation could include conducting investigation or research into the impact of the relocation program on Petitioners' religious practices or, at least, reviewing the existing information already available and identifying less restrictive alternatives to further relocation. At a minimum, the Government could present these findings to Congress and recommend that Congress consider alternative land or compensation which might be provided to the Hopi Tribe in exchange for the small, but essential sections of land still occupied by Petitioners. The United States could also support a permanent solution to the problem rather than the current lease arrangement that merely continues the long standing dispute.

[6] The "compelling interest" test was subsequently restored by Congress for purposes of free exercise of religion claims, including petitioners', by the Religious Freedom Restoration Act, 42 U.S.C. 2000 bb, et seq.

generally applicable" statute, rather than coercive government action which directly inhibits the exercise of religion. 110 S.Ct. at 1600.

The distinctions between the instant case and *Lyng, supra.* and *Roy, supra.,* apply with equal force to *Smith*. The 1974 Settlement Act is not a neutral, generally applicable, government program. It applies only to a small portion of the Navajo Nation, including Petitioners, who are compelled by a federal statute to relocate in violation of the tenets of their religion and which relocation prohibits the further exercise of their religion.

Furthermore, in response to the *Smith* decision, Congress passed the Religious Freedom Restoration Act (RFRA), 42 USC 2000 bb et seq. in 1993. RFRA effectively overruled *Smith* by restoring the "compelling interest" test as set forth in *Yoder, supra* and *Sherbert, supra,* to all cases where the free exercise of religion is substantially burdened

The Congressional findings and declarations of purposes of the RFRA state in part:

> (a) Findings. The Congress finds that --
>
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws `neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) government should not substantially burden religious exercise without compelling justification...
>
> *42 U.S.C. 2000bb(a).*
>
> (b) Purposes. The purposes of this Act are:
>
> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.
>
> *42 U.S.C. 2000bb(b).*

RFRA provides that government can not, "substantially burden a person's exercise of religion" even if the burden results from a neutral rule of general applicability unless the government can demonstrate that the burden: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *42 U.S.C. 2000bb-1.*

Congress made RFRA applicable, "to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act..." 42 U.S.C. 2000bb-3

In 1997, this Court addressed the constitutionality of the RFRA in a case involving a challenge to a denial of a church building permit by municipal zoning authorities. *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157 (1997). This Court found that RFRA was unconstitutional as applied to state and local law because Congress had exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment.

This Court stated: "Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the states." *Id.*117 S.Ct. at 2162. Congress' power under Section 5 is "remedial" and extends only to "enforcing" the provisions of the Fourteenth Amendment. *Id.* at 2164. Congress does not have, "the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *Id.*

The *Flores* opinion concluded: "Broad as the power of Congress is under the ... Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." *Id.* at 2171

This Court did not expressly address the question of the constitutionality of the RFRA's application to acts of the federal government. But the opinion's reasoning argues persuasively that the decision is limited to acts of state and local governments. Most courts that have considered the issue have concluded that this Court invalidated

RFRA only as applied to state and local law and that its application to action of the federal government remains at least an open question.[7]

In an opinion thoroughly analyzing the question the Eighth Circuit declared that despite *Flores*, "RFRA is constitutional as applied to federal law." (Emphasis in original) *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 856 (8th Cir. 1998), *cert. denied*, 119 S.Ct. 43 (1998). The Eighth's Circuit's original opinion in *In re Young* was decided prior to this Court's decision in *Flores*. 82 F.3d 1407 (1996). After this Court rendered its decision in *Flores* it granted *certiorari* in *Young* and then vacated and remanded the case to the Eighth Circuit "for further consideration in light of *City of Boerne v. Flores*, 117 S.Ct. 2502 (1997). Upon reconsideration, the Circuit Court reinstated its previous decision. 141 F.3d 834. This Court then declined to review the reinstated opinion.

Significantly, the United States conceded below that RFRA does apply to its actions in this case. *Supplemental Brief of the United States* at pgs. 31-35.(February 22, 1999). The government's argument now that "[t]he *Smith* standard applies" (*Brief in Opposition* at 14) to the merits of Petitioners' claim contradicts its own prior acknowledgment that it is the

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[7] "[T]he Supreme Court held that RFRA was unconstitutional as applied to State and local governments. The Court, however, has not determined, and the parties do not contend, that RFRA is unconstitutional as applied to federal law" *Adams v. Comm'r of the Internal Revenue Serv.*, 110 T.C. 137 (U.S. Tax Ct. 1998).

"The constitutionality of RFRA as applied to the federal government has not yet been clarified, either by the Supreme Court or within the Eleventh Circuit. While the trend seems to be to limit *Boerne* to its holding, it remains a fairly open question." *Gunning v. Runyon*, 3 F.Supp.2d 1423, 1432-1433 (S.D.Fla. 1998).

"We will continue to assume, without deciding, that RFRA is constitutional as applied to federal law." *Worldwide Church of God v. Philadelphia Church*, 227 F.3d 1110 (9th Cir. 2000). See also *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 833-834 (9th Cir. 1999).

"[T]he Supreme Court has declared [RFRA] unconstitutional as applied to the states." *Spies v. Voinovich*, 173 F.3d 398, 403 (6Th Cir.1999).

Flores held "that RFRA is unconstitutional as applied to state governments." *Peterson v. Shanks*, 149 F.3d 1140, 1145 (10th Cir.1998).

"[W]e assume, without deciding, that the RFRA applies to the federal government..." *Alamo v. Clay*, 137 F.3d 1366, 1368 (D.C. Cir. 1998).

compelling interest standard, as mandated by RFRA, that applies here. The 1974 Act is not a neutral and generally applicable law so the *Smith* decision would not apply. Even if it were RFRA, explicitly provides that such laws may not "substantially burden a person's exercise of religion" unless the government acts in furtherance of a compelling interest and unless it utilizes the least restrictive means.

Thus, the merits of Petitioners' claim must be analyzed under the traditional compelling interest standard regardless of whether the 1974 Act is found to be "neutral" or "generally applicable." Because *Smith* is inapplicable here and an examination of the facts reveals a far more substantial and direct burden of the free exercise of Petitioners' religion than was present in *Lyng*, Petitioners stand a significant chance of prevailing on the merits of their constitutional claim. In that Petitioners have no alternative forum in which to seek vindication of their constitutional right to the free exercise of religion, their petition should be granted.

Respectfully submitted.

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